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MICHAEL RODAK, JR.,

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

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THE PROCTER AND GAMBLE COMPANY
and FMC CORPORATION,
*Petitioners,*

*v.*

THE CITY OF CHICAGO,
*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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DANIEL M. GRIBBON
CHARLES LISTER
888 Sixteenth Street, N.W.
Washington, D.C. 20006

JAMES E. HASTINGS
JOHN C. BERGHOFF, JR.
135 South LaSalle Street
Chicago, Illinois 60603

*Attorneys for Petitioners*

*Of Counsel:*

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

CHADWELL, KAYSER, RUGGLES,
McGEE & HASTINGS
135 South LaSalle Street
Chicago, Illinois 60603

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Petitioners, The Procter and Gamble Company and FMC Corporation, pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit.

### OPINIONS BELOW

The opinion of the Court of Appeals, as yet unreported, appears in Appendix A. The opinion of the District Court for the Northern District of Illinois, reported *sub nom. Soap and Detergent Ass'n* v. *Chicago,* 357 F.Supp. 44 (N.D. Ill. 1973), appears in Appendix B.

## JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1975. Issuance of the mandate of the Court of Appeals has been stayed pending the filing of a petition to this Court for a writ of certiorari, as provided in Rule 41(b) of the Federal Rules of Appellate Procedure. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that only transportation facilities—boats, trains and trucks—are entitled to the full protection of the Commerce Clause, and that other forms of commerce are afforded a significantly lower degree of protection against local impediments and burdens.

2. Whether a local ordinance is valid under the Commerce Clause of the Constitution where it does not serve any existing local purpose or need and, as the trial court found, it creates serious impediments to the free movement of safe and effective products in interstate commerce.

3. Whether the Court of Appeals, in an effort to strike a "compromise" among the decisions of this Court, failed to apply well-settled rules regarding the proper application of the Commerce Clause to local legislation that burdens interstate commerce.

## STATUTES INVOLVED

This case involves an ordinance adopted by the City of Chicago, Code 17-7.3 (1973), and the Commerce Clause of the Constitution of the United States, Article I, section 8, clause 3. Both are printed in Appendix C.

## STATEMENT OF THE CASE

An ordinance adopted by the City Council of Chicago on October 14, 1970, prohibits the sale or distribution within the City of detergent products that contain phosphorus in any quantity or form. Violations of the ordinance are punishable by fine or, for second and subsequent offenses, by incarceration in the county jail for a period not to exceed six months. Nothing in the terms of the ordinance describes or identifies any purposes that it might be intended to achieve. The City Council did not adopt a declaration of policy or other explanatory statement to accompany the ordinance. The ordinance was adopted by the Council upon the recommendation of its Committee on Environmental Quality, but the Committee did not prepare written findings or submit a written report to the Council.

Petitioners here are The Procter and Gamble Company ("Procter") and FMC Corporation ("FMC"). Procter, directly and through subsidiaries, is a principal manufacturer of phosphate detergent products that are distributed and sold in Chicago, throughout the United States, and in numerous foreign countries. FMC is a principal manufacturer of phosphate compounds that are sold and distributed by FMC to Procter and other firms for use in the manufacture of detergent products. Detergent products containing phosphates manufactured by FMC are sold in Chicago and throughout the United States.

On May 4, 1971, this action was instituted in the United States District Court for the Northern District of Illinois, seeking declaratory and injunctive relief on the ground that the ordinance imposes an impermissible burden on interstate commerce, in violation of

the Commerce Clause of the Constitution.[1] Petitioners urged that phosphates are harmless and useful ingredients of numerous detergent products. Such products are in common use by households and commercial firms throughout the United States and the world, and have proved to be safe and effective for the performance of many cleaning tasks. Petitioners contended that the ordinance will severely impede the national distribution of detergent products, result in large additional costs, and prevent the sale of such products to consumers in wide areas outside Chicago. They urged that the ordinance does not serve any local purpose or need.

The City contended that the ordinance is intended to protect the Illinois and Mississippi Rivers, Lake Michigan, and various ancillary waterways[2] against excessive algal growth. If algae[3] are present in waterways in excessive quantities, they may result in a reduction of the oxygen content of such waters and cause a mildly offensive odor. Excessive algal growth limits the recreational usage of lakes and waterways, but it does not in any way threaten public health or safety.

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[1] The action was originally instituted by the Soap and Detergent Association, but petitioners, as well as Monsanto Company and Amway Corporation, subsequently joined as plaintiffs. The District Court ultimately held that the complaint should be dismissed as to the Association, Monsanto and Amway.

[2] The system of rivers and other waterways that flows from the City of Chicago into the Illinois River and ultimately into the Mississippi River is sometimes described in the record of this case, as well as in the opinions below, as the Illinois Waterway. For convenience, the same descriptive phrase is sometimes used in this petition.

[3] The term "algae" includes numerous varieties of aquatic plants.

*Proceedings in the trial court.* The District Court conducted a thirteen-day trial, at which elaborate scientific and other evidence was presented. Following trial, and after the submission of extensive briefs and memoranda, the court issued a detailed opinion that included careful factual findings. Based upon those findings, it held that the ordinance is in violation of the Commerce Clause, and granted declaratory and injunctive relief to petitioners.

The District Court found that phosphorus is "a natural and benign element" present in all living organisms, "including the human body" (B-6); that such detergents are "more effective" cleaning agents than nonphosphate products, and, unlike various alternative products, are "not at all harmful" to those who use them, or who wear clothing or use utensils washed in them (*id.*); and that phosphates are not pollutants and are used by some municipalities for purposes of water purification.

With respect to the City's contentions, the trial court found that enforcement of the ordinance had not provided, and could not be expected to provide, additional protection against excessive algal growth. (B-9-11.) It found that no problem of algal growth now exists in the Illinois or Mississippi Rivers, or in any ancilliary waterways that receive effluent from Chicago. The court concluded that the waters that receive effluent from Chicago are so muddy that sunlight cannot stimulate algal growth, and that periodic flushing by high water prevents the rooting of algae. Trace elements found in those waters also inhibit algal growth. (B-9.) In these circumstances, the presence of phosphorus and other nutrients is irrelevant. What-

ever the quantities of phosphorus in the Waterway, there is no realistic possibility of excessive algal growth.

Moreover, the trial court held that, even if these physical barriers were to be disregarded, the ordinance could not provide significant protection against algal growth. (B-9-10.) It found that the Waterway already contains a high level of phosphates contributed by leaves and other natural sources, the runoff of agricultural fertilizers, human and animal wastes, and industrial effluent. The quantities of phosphate contributed by detergents are "surplus," and can have "no effect on the growth of algae." (B-10.) Convincing evidence was presented to the trial court that the ordinance is "not justified" for the purpose of preventing algal growth. (*Id.*)

The City's claims with respect to the possibility of algal growth in Lake Michigan were also found to be unsupported by the evidence. The District Court specifically found that no "appreciable amount" of sewage from Chicago is permitted to flow into the Lake. (B-12.) Sewage from Chicago is released into the Lake only during periods of unusually heavy rainstorms, if the local sanitary facilities have become temporarily overloaded. This has occurred only four times in the past 10 years, and in each instance the discharge into the Lake was "relatively minimal." (*Id.*) The court concluded that the ordinance could not be justified by any claim that it might help to protect Lake Michigan against algal growth. (B-13.)

The trial court found without qualification that enforcement of the ordinance had "seriously disrupted the flow of interstate commerce." (B-6.) Phosphate

detergents distributed in Chicago are manufactured in plants located throughout the midwest, sold to distributors of household products, and stored by them in warehouses. The warehouses that serve Chicago also serve retail stores in northern Illinois, southern Wisconsin, Michigan and Indiana. The court found that several important burdens had been imposed upon commerce by the ordinance:

> (a) The ordinance prevents the distribution and sale of all phosphate detergent products, although such products are in widespread use throughout the United States, and have been found to be safer and more effective for many household and commercial purposes than any alternative product. (B-6.)
>
> (b) Enforcement of the Chicago ordinance will prevent the distribution and sale of phosphate detergents in wide areas outside Chicago, both in Illinois and in adjacent states. (B-7.)
>
> (c) Compliance with the ordinance will require Procter to revise drastically its manufacturing and distributional processes, and to adopt a series of "uneconomical makeshifts." As a result, Procter will incur increased costs of approximately $2.5 million annually. (B-7.)
>
> (d) Enforcement of the ordinance compelled Procter to halt all of its sales of detergent products for a period of several months, until safe but less effective nonphosphate products could be formulated. In the interval, Procter lost sales amounting to approximately $4.7 million. (B-7.)
>
> (e) FMC will lose annual sales of approximately $500,000 as a consequence of the ordinance. (B-8.)

The trial court noted that a "patch-work pattern" of ordinances and statutes has been adopted by other

state and local governments to regulate the distribution and sale of phosphate detergents. (B-3.)[4] Those ordinances and laws create disparate requirements with respect to phosphate content, the categories of products to which they are applicable, and other pertinent matters. This "diverse" pattern of requirements has already imposed large additional costs upon manufacturers and distributors. (*Id.*)

*Proceedings in the Court of Appeals.* The Court of Appeals declared that this case involves "a very difficult constitutional problem." (A-20.) It acknowledged that it had serious doubts as to the "precise test" that is applicable here (A-6), and concluded that an appropriate standard could be formulated only by striking a "compromise" among the decisions of this Court. For this purpose, the court fashioned a series of novel constitutional requirements premised on the proposition that the Commerce Clause was chiefly intended to shield interstate transportation against local regulation, affording products that move in commerce a markedly lower standard of protection. It concluded that the Chicago ordinance must be sustained unless petitioners could demonstrate that it could "never" at any future time assist in the prevention of algal growth. (A-18.)

The Court of Appeals did not reject the detailed and extensive factual findings made by the District Court

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[4] A partial listing of such ordinances and statutes is included in the appendix to the City's brief in the Court of Appeals. 1 Appendix 93-98. For example, the municipalities of Cocoa Beach and Kissimmee in Florida, Bridgeton and Kennebunkport in Maine, and Painesville and Independence in Ohio have all adopted such ordinances. Some such ordinances forbid the inclusion of any phosphorus; others permit the inclusion of only limited quantities of phosphorus; and still others exempt various categories of detergent products. *Id.* at 96-98.

regarding the burden imposed on interstate commerce by the ordinance. It chose instead to characterize that burden as merely "incidental" and "slight." (A-13, 15.) The court "recognize[d]" that the ordinance would interfere with the distribution of phosphate detergents in areas outside Chicago, but it suggested, without reference to any evidence, that a method could "probably" be found to provide such products to consumers in such areas. (A-15.)

Although the Court of Appeals acknowledged that "credible evidence" had been presented that no problem of algal growth now exists in the Illinois Waterway, it "assume[d]" that such algae may nonetheless be present and that there may be a "possibility" that additional growth may occur in the future. (A-17-18.) Despite the District Court's findings, and without reference to any evidence, it suggested that the "prospect" for future algal growth is "unknown." (A-18.)

The Court of Appeals recognized that phosphates already present in the Waterway from other sources substantially exceed the quantities needed for algal growth. It agreed that even the introduction of large additional quantities of phosphates would not stimulate increased algal growth. Nonetheless, the court stated that petitioners had not demonstrated with the requisite conclusiveness that the present situation could not change, or that the ordinance might not at some future time help to prevent such growth. (A-18.) On this basis, the Court of Appeals reversed the judgment entered by the District Court.

## REASONS FOR GRANTING THE WRIT

This case involves questions of national significance regarding the proper application of the Commerce

Clause to local legislation. It presents fundamental issues, applicable to numerous forms of commerce, regarding the extent to which municipal authorities are permitted to create local impediments to the free movement in interstate commerce of safe and beneficial products. The Court of Appeals acknowledged that this case involves "a very difficult constitutional problem" (A-20), and expressed serious uncertainty as to the proper application of the decisions of this Court. (A-6.) This case affords the Court an important opportunity to resolve such uncertainties and to make clear the principles that should be used to accommodate local legislation to the overriding requirements of the Commerce Clause.

The Court of Appeals reasoned that the constitutional standards applicable here may be determined only by striking a "compromise" among the decisions of this Court. (A-9.) In so doing, it fashioned novel requirements, the application of which will encourage the adoption of disparate and conflicting local restrictions upon the movement in interstate commerce of safe and beneficial products. The free national market for manufactured goods, upon which much of the nation's economic vitality depends, would be divided and balkanized. Review by this Court is urgently needed to reestablish the strong protection that the Commerce Clause was intended to provide.

**I. Contrary to the Decisions of This Court, the Court of Appeals Has Unjustifiably Limited the Protection Afforded by the Commerce Clause to Products Moving in Interstate Commerce.**

The Court of Appeals held that the full protection of the Commerce Clause is extended only to methods of interstate transportation, and that the free move-

ment of manufactured goods is entitled only to a much lower degree of protection. It assumed that the Clause was designed chiefly for the protection of the instrumentalities of commerce—boats, trains and trucks—and not for commerce itself. The low standard of protection permitted by the court for manufactured goods, together with the other unjustifiable requirements it imposed, would create a broad exception to the protection previously afforded by the Commerce Clause. Continued application of the exception would permit the destruction of the free national market for numerous forms of commerce.

The court's assumption that the full protection of the Commerce Clause extends only to transportation facilities is contrary both to the Founders' intentions and to the decisions of this Court. Alexander Hamilton emphasized in support of the new Constitution that it was designed to prohibit local trade barriers and embargoes, and to assure "a free circulation" of "commodities" through every part of the nation. *The Federalist,* No. 11. Similarly, James Madison declared that the Founders sought to foster a national economy, in which goods from every locality could be freely distributed, without impediments created by "rival, conflicting and angry regulations." 3 Farrand, *The Records of the Federal Convention of 1787* at 547 (1937).

This Court has consistently adhered to the same goals. It has repeatedly emphasized that local authorities may not regulate interstate commerce "so as substantially to affect its flow or deprive it of needed uniformity in its regulation. . . ." *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 775 (1945). The Commerce Clause creates a "policy of free trade," *Bibb* v. *Nav-*

*ajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959), that is intended to shield the national economy against both "interference by the States," *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946), and "local entanglements." *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 760 (1967). In *Hood & Sons* v. *DuMond*, 336 U.S. 525 (1949), the Court summarized the purposes of the Commerce Clause in terms that closely follow those used by Hamilton and Madison:

> "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by custom duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality." *Id.* at 539.

Only this Term, the Court reiterated the principles summarized in *DuMond*, and emphasized that the "philosophy" of the Commerce Clause is "to federalize the regulation of interstate and foreign commerce," and thereby to provide protection against local barriers and embargoes. *Allenberg Cotton Co.* v. *Pittman*, —— U.S. ——, 42 L.Ed.2d 195, 204 (1974).

Nothing in the opinions of this Court or the history of the Commerce Clause suggests that its protection is limited to methods of transportation. To the contrary, this Court held in *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), that the Clause encompasses "commercial intercourse between nations, and parts of nations, in all its

branches. . . ." *Id.* at 189.[5] The Court has repeatedly emphasized that the Clause reaches far beyond methods of transportation to include every aspect of trade or business that, directly or indirectly, extends past the boundaries of a single state. *E.g., United States* v. *Southeastern Underwriters Ass'n,* 322 U.S. 533, 550 (1944); *Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, 254-55 (1964).

Consistent with the principle first announced in *Gibbons* v. *Ogden, supra,* the protection of the Clause has been given to every variety of commercial activity. Cantaloupes,[6] books and correspondence courses,[7] oleomargarine,[8] intoxicants,[9] shrimp,[10] natural gas[11] and other disparate products have all been held to be encompassed by the Clause. The narrow and grudging rule adopted by the Court of Appeals, by which pro-

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[5] The Court of Appeals has precisely reversed the problem presented in Gibbons v. Ogden, *supra.* In *Gibbons,* counsel argued that the Clause encompasses the "interchange of commodities," 9 Wheat. at 189, but not interstate transportation facilities. In this case, the Court of Appeals held that the Clause gives principal protection to boats and trains, and only inferior protection to commodities. Both positions are contrary to the constitutional standards to which this Court has long adhered.

[6] Pike v. Bruce Church, 397 U.S. 137 (1970).

[7] International Textbook Co. v. Pigg, 217 U.S. 91 (1910).

[8] Schollenberger v. Pennsylvania, 171 U.S. 1 (1898); Collins v. New Hampshire, 171 U.S. 30 (1898).

[9] Bowman v. Chicago & N. R. Co., 125 U.S. 465 (1888); Leisy v. Hardin, 135 U.S. 100 (1890). The application of the Commerce Clause to intoxicants is now limited by Section 2 of the Twenty-first Amendment, which authorizes the imposition under state law of restrictions upon the importation of liquor into a state.

[10] Toomer v. Witsell, 334 U.S. 385 (1948).

[11] Oklahoma v. Kansas Gas Co., 221 U.S. 229 (1911).

tection would be given principally to transportation facilities, is inconsistent with well-settled principles regarding the interpretation of the Commerce Clause. Review by this Court is urgently required to clarify the constitutional standards that are properly applicable here.

**II. Contrary to the Decisions of This Court, the Court of Appeals Created an Unjustifiable Presumption Favoring the Validity of Local Impediments to Interstate Commerce.**

The Court of Appeals acknowledged that, in accordance with the "predominant test" established by this Court, the validity of local legislation under the Commerce Clause must be determined by balancing any burdens imposed on interstate commerce against any local benefits. (A-7.) Nonetheless, the court relied upon *Brotherhood of Locomotive F.&E.* v. *Chicago, R.I. & P.R. Co.*, 393 U.S. 129 (1968), to suggest that this "predominant test" should not be applied to this case. Instead, the court appeared to treat the issues presented here as if the only applicable constitutional requirements were derived from the broad provisions of the Due Process Clause of the Fourteenth Amendment. On that basis, it fashioned a novel "presumption," unsupported by the decisions of this Court, to determine the constitutionality of the Chicago ordinance. (A-9-10.)

The Court of Appeals stated that whenever local legislation relates to matters of local concern, and the burden it imposes upon commerce can be characterized by an appellate court as "slight," the legislation must be "deemed" to be "reasonably effective" unless it is shown by "clear and convincing proof" that the legislation can never prove effective. (A-10.) The

court held that, in the absence of such evidence, it is unnecessary to balance the burdens imposed upon interstate commerce against any local benefits. The rule stated by the Court of Appeals, while general and imprecise, would plainly establish a strong presumption favorable to the validity of local legislation under the Commerce Clause.

This Court has specifically rejected the notion, adopted here by the Court of Appeals, that a presumption that local legislation has been validly enacted can be permitted to control the applicability of the Commerce Clause to that legislation. *Minnesota* v. *Barber*, 136 U.S. 313, 319 (1890). To the contrary, the Court stated in *Pike* v. *Bruce Church, supra,* that the application of the Commerce Clause requires the resolution of questions "of degree," involving the extent of any burden, the nature of any local interest, whether less burdensome methods are available to vindicate the local interest, and other similar matters. *Id.* at 142. The Court recognized that, although various formulae have been suggested for this purpose, it has in fact consistently resolved such questions through a "balancing approach." *Id.*[12] The Court has sought through such balancing to reach a proper "appraisal and accommodation of the competing demands of the state and national interests involved." *Southern Pacific Co.* v. *Arizona, supra* at 769. The refusal of the Court of Appeals to balance the relevant national and local interests is contrary to the requirements established in *Pike* v. *Bruce Church, supra,* and numerous other

[12] Similarly, Professor Freund has observed that the Court has "abandoned the merely verbal criteria" and sought "on a highly particularistic basis" to weigh local benefits against the burdens imposed on commerce. P. Freund, *The Supreme Court of the United States* 21 (Meridian ed. 1961).

cases. The presumption engrafted by the Court of Appeals to the principles long adhered to by this Court will create widespread and serious confusion among legislators and lower courts as to the proper application of the Commerce Clause.

The reliance of the Court of Appeals upon *Brotherhood of Locomotive F.&E.* v. *Chicago, R.I. & P.R. Co., supra,* was obviously misplaced. The issue there was whether a full-crew requirement established for railroads by Arkansas was in violation of various constitutional requirements, including the Commerce Clause. The controlling question was whether, as the union urged, the statute was reasonably designed to enhance the safety of railway employees. The Court emphasized that the evidence with respect to that question was "certainly conflicting and to a considerable extent inconclusive." *Id.* at 136. It held that "on this showing" state legislation involving possible threats to "lives and limbs" should not be disturbed. *Id.* at 140.

This case is markedly different. There is no possibility here of any "loss of lives and limbs." There is no question of public health or safety. The products involved here are commonplace articles of household use, employed safely by consumers and others throughout the United States and the world. Here, as in *Pike* v. *Bruce Church, supra* at 143, the local legislation is not intended to protect consumers against contaminated or unfit goods, and the broad discretion given to local authorities in such situations is inapplicable. In these circumstances, the decision of this Court in *Brotherhood of Locomotive Firemen* is inapposite, and the presumption of validity created by the Court of Appeals is in conflict with controlling principles to which this Court has consistently adhered.

### III. The Court of Appeals Imposed Unjustifiable Evidentiary Burdens That Prevent the Proper Application of the Commerce Clause.

The Court of Appeals acknowledged that there is "clear" evidence that phosphorus is not "at this time" the "limiting factor" for algal growth in the Illinois Waterway. (A-18.) It agreed that the ordinance cannot have any "immediate effect" upon any possibility of such growth in the Waterway. (*Id.*) Nonetheless, the court held that, although the ordinance might not now contribute to the solution of any environmental problem, it must be sustained because petitioners had not demonstrated that it could "never" at any future moment prove helpful. (*Id.*)

In so doing, the court placed entirely unjustifiable burdens upon petitioners. In combination with the other rules adopted by the court, broad application of such an evidentiary requirement would deny manufactured goods any genuine degree of protection under the Commerce Clause. Protection would be limited to rare situations in which it could be shown unequivocally that local legislation is not merely useless now, but also that there can "never" be a distant moment at which it might prove useful. Application of the Commerce Clause would depend, as it did here in the Court of Appeals, upon unsupported speculations as to future possibilities. Any such rule would threaten the strong national purposes that the Clause was intended to serve.

**IV. Application of the Constitutional Standards Adopted by the Court of Appeals Will Destroy the National Market for Detergents and Other Beneficial Products.**

The Chicago ordinance is only part of a "patchwork pattern" of requirements regarding phosphate detergents that has been adopted by state and local authorities. (B-3.) The jurisdictions that have adopted such requirements are scattered throughout the United States. Many such jurisdictions are villages, towns and small municipalities.[13] They have adopted diverse requirements with respect to phosphate content, product exemptions and other important matters. These ordinances and laws threaten in combination to destroy the national market for detergent products and to create a series of disparate local markets, each with its separate tangle of local prohibitions and requirements.[14]

Moreover, each of these ordinances and laws may adversely affect the distribution of detergent products outside the jurisdiction that has adopted it. The District Court found, following the presentation of extensive evidence, that the distributional system for such products cannot be tailored to the particular de-

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[13] *Supra* at n. 4.

[14] The Court of Appeals disregarded such other ordinances and laws with the suggestion that they are only potentially in conflict. (A-11-12.) In fact, petitioners made an offer of proof at trial to establish that actual conflicts already exist. 1 Appendix 833-36. In any event, the Court of Appeals failed to consider the important burdens that are created by diverse and scattered local prohibitions, each of which serves to balkanize still further the national market. Here, as elsewhere, the court overlooked this Court's repeated admonition that the Commerce Clause is intended to establish a "policy of free trade," Bibb v. Navajo Freight Lines, Inc., *supra* at 529, and to eliminate local trade barriers and embargoes.

mands of each village and municipality. (B-6-7.) For this purpose, even a city as large and important as Chicago cannot be isolated from the areas that surround it. As a result, each such ordinance and law may interfere substantially with the distribution of detergent products in wide adjacent areas.[15]

The constitutional standards adopted by the Court of Appeals are not limited in application to phosphate detergent products. To the contrary, those standards create novel requirements that are fully applicable to all products that move in interstate commerce. For environmental and other justifications, state and local authorities have adopted, or now are considering, local prohibitions and requirements regarding a wide variety of other goods and manufactured products. Several cases have already arisen in the state and lower federal courts, and others may reasonably be anticipated.[16] Review by this Court is urgently needed to define the principles that should be used to determine the validity of such ordinances and laws. Without immediate guidance from this Court, judges and legislators will remain uncertain as to the proper application of the Commerce Clause, and the strong national policies embodied in the Clause will be seriously threatened.

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[15] The Court of Appeals acknowledged that the ordinance "does have an extraterritorial effect," that "the free flow in commerce of a particular product is disrupted," and that such a disruption "must be deemed a burden on interstate commerce." (A-13.)

[16] *E.g.*, American Can Co. v. Oregon Liquor Control Comm'n, 517 P.2d 691 (Ore. App. 1974); Society of Plastic Ind. v. New York City, 3 E.R.C. 1114 (N.Y. Sup. Ct. 1971); SDA v. Clark, 3 E.R.C. 1075 (S.D. Fla. 1971); SDA v. Offutt, 3 E.R.C. 1117 (S.D. Ind. 1971); Colgate-Palmolive Co. v. Erie County, 3 E.R.C. 1673 (N.Y. Sup. Ct. 1971).

## CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DANIEL M. GRIBBON
CHARLES LISTER
888 Sixteenth Street, N.W.
Washington, D.C. 20006

JAMES E. HASTINGS
JOHN C. BERGHOFF, JR.
135 South LaSalle Street
Chicago, Illinois 60603

*Attorneys for Petitioners*

*Of Counsel:*

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006

CHADWELL, KAYSER, RUGGLES,
McGEE & HASTINGS
135 South LaSalle Street
Chicago, Illinois 60603

## APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 73-1650

THE PROCTER AND GAMBLE COMPANY, and FMC CORPORATION,
*Plaintiffs-Appellees,*

v.

THE CITY OF CHICAGO,
*Defendant-Appellant.*

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DECIDED JANUARY 15, 1975

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Before SWYGERT, *Chief Judge,* FAIRCHLD and CUMMINGS, *Circuit Judges.*

SWYGERT, *Chief Judge.* This appeal presents the question of whether an ordinance of the City of Chicago that bans the use of detergents containing phosphates is unconstitutional on the ground that it results in an impermissible interference with interstate commerce. This district court decided that the ordinance is unconstitutional.[1] We disagree.

The ordinance was adopted by the City Council after its Committee on Environmental Control had held public meetings for three days. The measure provided that the

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[1] *Soap and Detergent Ass'n* v. *Chicago,* 357 F.Supp. 44 (N.D. Ill. 1973).

sale of detergents containing any phosphorous after June 30, 1972 constituted a criminal offense.[2] Most detergents sold in this country contain phosphates which are compounds containing the element phosphorous.

The present action was brought seeking declaratory and injunctive relief. Plaintiff-appellee Procter and Gamble Company is a manufacturer of phosphate detergents. Plaintiff-appellee FMC Corporation processes and manufactures sodium tripolyphosphate and other phosphate products for use in detergents. Three other plaintiffs were dismissed for failure to prove the jurisdictional amount and have not appealed. The second amended complaint alleged only a violation of the Commerce Clause of the Constitution (Article I, Section 8, Clause 3) and the case was tried on that issue.

A substantial amount of evidence, including exhaustive expert scientific and technical testimony by many witnesses, was presented both in court and by depositions. As the district court observed, this evidence is much too extensive to be set out in any detail. We think we need present only a broad outline of the more relevant evidence.

The plaintiffs unquestionably showed that the ordinance has had an adverse effect upon their businesses which admittedly are national in scope. Procter and Gamble was unable to sell any detergents in the Chicago area for five months after June 30, 1972 and lost $4,700,000 in sales as a result. FMC lost $500,000 worth of sales of phos-

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[2] Chicago, Ill., Code ch. 17, art. VII, § 17-73(b) (1973) provides:

> It shall be unlawful for any person, firm, or corporation to sell, offer or expose for sale, give or furnish any synthetic detergent or detergent containing any phosphorus, expressed as elemental phosphorus, including synthetic detergents or detergents manufactured for machine dishwashers, dairy equipment, beverage equipment, food processing equipment and industrial cleaning equipment, within the City of Chicago from and after June 30, 1972.

phates as a result of the ordinance. Further, whereas before the ordinance Procter's Chicago plant was able to supply over 96 percent of the requirements for the six-state "Chicago Plant Area," after the ordinance became effective the plant could supply only 51 percent, which necessitated shipments to this area from other Procter plants in Louisiana, Missouri, and Kansas. The result was the establishment of a different and, from the company's viewpoint, a less efficient interstate system of distribution of its products.

Evidence was also introduced concerning the warehousing practices of the retail grocery chains serving Chicago and the surrounding area. These chains, which include chains of independents, warehouse their products on an area-wide basis as opposed to a city-wide basis. Goods are purchased from the manufacturer and stored in warehouses for eventual distribution to the individual retail stores. In the Chicago area, the same warehouses also service stores in northern Illinois, northern Indiana, southern Wisconsin, and Michigan. At the warehouses, each product is stored in its own particular area called a slot. There was testimony that these warehouses will not "double slot" a product and thus refused to carry both phosphate and non-phosphate versions of the same product. The explanation is that there is not sufficient space in the warehouses and there would be the possibility of a violation of the ordinance if phosphate formulas were accidently shipped to Chicago stores. Of the seventeen major Chicago area customers of Procter and Gamble, fifteen chose to carry only non-phosphate detergents. The result has been that consumers in areas of Illinois or the other adjacent states where the sale of phosphate detergents is legal can purchase only non-phosphate formulas of the major detergents from stores which are part of these fifteen chains. Thus, the Chicago ordinance affected Procter and Gamble's ability to sell its phosphate detergents in other states.

The bulk of the evidence dealt with the nature and effect of phosphates and particularly their effect on the water moving in the Illinois Waterway. Phosphates are not a problem in and of themselves. They are not harmful to most humans and are even added to water by some communities for the purpose of softening. The aspect of phosphates that causes concern is their nutritive contribution to the eutrophication of rivers or lakes. Eutrophication is a process of aging, whereby a body of water becomes over-nourished in nutrient elements such that there occurs an extensive growth of green plants or nuisance algae. Nuisance algae can result in an unpleasant ordor and a bad taste in drinking water. It is the elimination and prevention of these algae that is desirable.

Some controversy exists, however, concerning the relationship of phosphorous and eutrophication. An abundance of phosphorous does not always result in increased eutrophication. It is a more complex process and its exact nature is somewhat in dispute. Other nutrients including nitrogen and carbon are needed for eutrophication. So far as the nutrient aspect of eutrophication is concerned the important inquiry centers on the idea of the "limiting nutrient" or "limiting factor." The "limiting nutrient" is that nutrient that is in the shortest supply relative to the need for it for plant growth. It is the factor which limits any further aquatic growth. The district court found that phosphorous can be a "limiting factor" for nuisance algae only at .02 milligrams per liter or less. There is some evidence, however, that phosphorous is the nutrient that is most easily controlled.

The ordinance's most direct effect is on the Illinois Waterway because the City's sewage effluent flows into it. This Waterway, which includes the Illinois River, is a water source for some communities, but not for Chicago. The Waterway has a very high percentage of phosphorous. The district court determined that before the passage of

the ordinance the amount of phosphorous present in this Waterway was at least twenty-five times as much as is necessary to sustain nuisance algae. Still, there is a question of whether there is any nuisance algae problem in the Illinois River. Although the City introduced photographs showing the presence of such algae, the district court concluded "that there was no significant amount of nuisance algae in the Illinois River."[3] Explanations offered for this lack of growth included the excessive turbidity of the river which prevents needed sunlight, periodic flushing, and possibly some undefined trace elements which inhibit such growth. Also, the district court found that the elimination of Chicago phosphates alone would not result in reaching the "limiting factor" level, though a 66 percent reduction did result in at least part of the Waterway after the ordinance had been in effect.

Finally, there is the evidence concerning Lake Michigan which is the source of Chicago's water supply. The danger of nuisance algae is more pronounced with regard to Lake Michigan because it does not have the flushing quality of a river. Moreover, the phosphorous concentration is at about the "limiting factor" of .02 milligrams per liter. But unlike some of the other communities along the lake, Chicago's sewage does not normally flow into the lake; only during excessively heavy rainstorms is one of two rivers reversed so that sewage flows into Lake Michigan. The district court determined that such reversals occurred only four times within a ten year period, though there was also testimony that the frequency of such reversals is increasing. As to the amount of phosphates entering the lake during a year in which a back-flow resulted, the conclusion of the district court was that detergents contributed only 250 tons or about three percent of the total entering the lake each year.

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[3] 357 F.Supp. at 49.

Based on this evidence the trial court determined that the phosphate ban was unconstitutional. It decided that the ordinance resulted in increased costs of manufacture and distribution and burdened interstate commerce. Once the plaintiffs had proven this much the court held that the City was then required to justify the ordinance by showing some need to protect the public health, safety, or welfare. Though it found that the "ordinance was enacted in good faith and for laudatory objectives,"[4] the justifications offered for the ordinance were not sufficient to outweigh its interference with interstate commerce. The court held that the City did have the power to protect the water quality for persons living downstream, but the ordinance by itself would not have any beneficial effect on the Illinois Waterway. The actual effect on Lake Michigan was apparently considered too minimal to support the legislation; the theory that the City could enact the ordinance in order to influence other communities to stop discharging phosphates into Lake Michigan was rejected. Though the court conceded that such an ordinance might be sustained in some other jurisdiction where the water supply situation is different, it concluded that Chicago could only enact the ordinance on a standby basis to become effective only when other controls have brought the phosphorous content of the Illinois Waterway down to the "limiting level."

## I

It is difficult to discern the precise test that should be used to determine when a state or local legislative enactment's effect on an area of interstate commerce that has not been preempted by Congressional legislation is violative of the Commerce Clause of the Constitution. It is clear that we must first decide whether there is such an effect and what it is, for if we find no effect our inquiry need not

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[4] 357 F.Supp. at 51.

progress. However, if some effect is found then we must proceed to consider whether the legislative body "has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought."[5] The more difficult question is whether our analysis should encompass an additional step if the legislation is found to be a reasonable means of achieving a legitimate end. The predominant test utilized by the Supreme Court appears to require that the burden imposed on interstate commerce be balanced against the local benefit in order to determine the ultimate question of constitutionality. *See Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), and *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945). The Court's most recent formulation is that contained in *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

There is some support, though, for the proposition that once it is determined that the legislation is a reasonable means of achieving a nondiscriminatory, legitimate goal it should be deemed constitutional and any further weighing process need not occur.[6] One commentator has suggested that this "third stage" balancing process is undesirable because it can lead to the usurpation of the legislative role.[7] Moreover, it is argued that in fact the

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[5] *S. C. Highway Dep't* v. *Barnwell Bros.*, 303 U.S. 177, 190 (1938).

[6] Obviously, there is some degree of balancing involved in the initial determination of whether the end sought is a legitimate local concern.

[7] D. ENGDAHL, CONSTITUTIONAL POWER: FEDERAL AND STATE IN A NUTSHELL (1974). Engdahl's theory is discussed in Note, *Use of*

Supreme Court has perhaps eliminated this final balancing step by its opinion in *Brotherhood of Locomotive Firemen & Enginemen* v. *Chicago, Rock Island & Pacific Railroad Co.*, 393 U.S. 129 (1968). *Brotherhood* involved the validity of the Arkansas "full-crew" laws for railroads. The district court had analyzed conflicting evidence concerning the safety value of such laws and determined that at best they provided for a small increment in safety not worth the cost. This was found not to outweigh the burden on interstate commerce. In reversing, the Supreme Court indicated that the analysis endorsed by the lower court was incorrect:

> We think it plain that in striking down the full-crew laws on this basis, the District Court indulged in a legislative judgment wholly beyond its limited authority to review state legislation under the Commerce Clause.[8]

The matter was one properly left for the legislature because the evidence "leaves little room for doubt that the question of safety in the circumstances of this case is essentially a matter of public policy, and public policy can, under our consitutional system, be fixed only by the people acting through their elected representatives.'"[9]

The *Brotherhood* case has been relied upon in cases similar to the one at bar. In discussing the Commerce Clause implications of an environmental statute a state court commented:

> The language of Pike v. Bruce Church, Inc., supra, does not mechanically compel a weighing process in every case. The language is instructive in appropriate cases rather than mandatory in all cases . . . . The

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*the Commerce Clause to Invalidate Anti-Phosphate Legislation; Will it Work?*, 45 U. COLO. L. REV. 487 (1974).

[8] 393 U.S. at 136.

[9] 393 U.S. at 138.

> United States Supreme Court recognized the inappropriateness of a weighing process in cases of noncomparable benefit and injury . . . in Firemen v. Chicago, R.I. & P. R. Co. . . .[10]

Indeed, one court confronted with a challenge to the same type of legislation before us adopted the *Brotherhood* opinion as the controlling case.[11]

Our case, we believe, has elements that require a compromise between *Brotherhood* and *Pike*. Like *Brotherhood* there is conflicting evidence concerning the value of this legislation. Here the conflict relates more to the question of whether the ordinance will result in preventing nuisance algae, as opposed to the question of how much benefit there is from the removal or prevention of such algae. The latter is the type of "public policy" question that is directly addressed in *Brotherhood*. The district court did not and should not have evaluated the benefits to be derived from the improved water quality associated with the elimination of nuisance algae. It was proper, however, for the court to consider the "factual" question of whether the ordinance has any relationship to the elimination of nuisance algae. The question that we are faced with is how much weight, if any, should be accorded the legislative body's determination that the means are reasonably related to achieving the end. In the present case we think that it is at this point that the *Pike* balancing stage occurs. The district court addressed this issue as if it was an ordinary factual dispute over a technical matter that should be decided without the benefit of a presumption. It is our view, however, that if the burden on interstate commerce is slight, and the area of legislation is one that is properly of local concern, the means chosen to accomplish

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[10] *American Can Co.* v. *Ore. Liquor Control Comm'n*, 517 P.2d 691, 697 (Ore. App. 1974).

[11] *Soap and Detergent Ass'n* v. *Clark*, 330 F.Supp. 1218 (S.D. Fla. 1971).

this end should be deemed reasonably effective unless the party attacking the legislation demonstrates the contrary by clear and convincing proof.[12] If it is determined that this presumption should be applied, no further balancing need be undertaken. The end has already been deemed legitimate and the burden on interstate commerce slight. If the legislation is a reasonable means to that end it is constitutional.

## II

Having in mind the framework of our analysis, we begin by considering what, if any, burden was imposed on interstate commerce by this ordinance. The first major argument raised by the plaintiffs, and apparently accepted by the district court, is that the ordinance burdened interstate commerce by impairing the normal operation of companies having interstate sales and requiring these companies to create new, and less direct, shipping routes. The argument is based on the fact that Procter and Gamble's plant in the Chicago area could not adequately supply its six-state area with detergents because the plant had to manufacture two lines of detergent products and thus reduce its capacity. The result was that products had to be shipped to some of these states from plants which happened to be at different, and often further, locations. The principal cases relied on to support this theory involve interstate carriers whose ability to efficiently transport other's goods through particular states was permanently impaired.[13] With our case, we are not confronted with a situation in which legislation has reduced the effectiveness of a means of transportation itself. In this context the ordinance is not a burden on interstate commerce,

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[12] See also the suggestion for a somewhat different presumption in Note, *supra*, n .7, at 493.

[13] *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945).

but is merely a "burden" on a company which happens to have interstate distribution facilities. The effect of the ordinance is that the particular interstate systems of distribution used by Procter and Gamble and other detergent companies before the passage of the ordinance can no longer be used. This is because of the freely chosen geographical locations of their various plants, not because of the requirements of this ordinance. There is no impairment of the ultimate ability to transport in interstate commerce in the most efficient and economical manner possible. While this factor might necessitate a change in certain production facilities, it does not rise to the level of an unconstitutional burden on interstate commerce.[14]

Plaintiffs also argue that the ordinance is a burden on interstate commerce because there is a "potential for conflicting legislation." Other jurisdictions, including some within the Chicago marketing area, have enacted phosphate detergent legislation, and it is urged that such local legislation might conflict with each other so as to inhibit the uniformity necessary for the national manufacture and distribution of detergents. It is claimed that Milwaukee has an ordinance that not only restricts phosphates, but also prohibits highly alkaline detergents which have been used as substitutes for phosphate detergents. But there is no evidence in the record to prove that any phosphate substitutes used by the appellees in Chicago violate Milwaukee's ordinance. The Supreme Court has indicated that in a case involving environmental legislation it is actual conflict, not potential conflict, that is rele-

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[14] A similar conclusion was reached in the analogous case of *Colgate-Palmolive Co.* v. *Erie County*, 327 N.Y.S.2d 488, 491 (Sup. Ct. 1971):

> The primary burden which is placed upon the petitioner Colgate involves nothing more than the changing of production facilities at the point of origin. There is no interference mandated by the County Law with transit across the state lines. . . .

vant.[15] Moreover, once again the plaintiffs have drawn the main support for their argument from the cases involving interstate carriers. The importance of uniformity is not as great in the present type of case in terms of interstate commerce. As Judge Stevens of this circuit has stated:

> [W]e think it certainly is true where you have a carrier who necessarily goes from state to state carrying the goods of third parties there is a higher interest in uniformity throughout the nation, but with respect to a commercial enterprise such as a manufacturer of detergents there is not the same national interest in uniformity throughout the country.[16]

No burden has been shown based on this theory.

Another argument presented by plaintiffs is that the ordinance burdens interstate commerce because it amounts to an embargo on a safe, useful, and unique product of commerce without any corresponding local benefit. We find no merit to this argument. In essence, it is not a Commerce Clause argument but one based on substantive due process, an issue not before us. The only Commerce Clause cases cited for this proposition involve situations in which a state has attempted to achieve a local purpose by discriminating against out-of-state producers or manufacturers.[17] There is no discrimination in this case. The ordinance does not require that detergents be manufactured in Chicago or Illinois and does not benefit manufacturers who are located there.

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[15] *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 448 (1960).

[16] *Soap and Detergent Ass'n* v. *Offutt*, 3 ERC 1117, 1119 (S.D. Ind. 1971).

[17] *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970); *West* v. *Kansas Natural Gas Co.*, 221 U.S. 229 (1911); *Minnesota* v. *Barber*, 136 U.S. 313 (1890).

There is one theory of plaintiffs, however, in which we find some merit. This ordinance does have an extraterritorial effect because of the four-state warehouse marketing system employed by the major wholesale purchasers of detergents. Since a substantial number of the retail grocery stores within a 150 mile radius of Chicago are supplied from seventeen grocery warehouses in or near Chicago, the refusal of these warehouses to "double slot" detergents means that many people outside Chicago cannot buy phosphate detergents even though they wish to use them. Potential purchasers in other states are prevented from obtaining a detergent formula that manufacturers may legally sell in those states. Though the ordinance may not directly dictate such a result, one effect is that the free flow in commerce of a particular product is disrupted. Such a disruption must be deemed a burden on interstate commerce.

Still, there is the question of how substantial is this burden. It is important to realize that this burden is one that was not intended by the City Council, even though that factor is not determinative. The effect is an incidental one due to the nature of the grocery warehouse system over which the City Council has no control.

Moreover, all the potential purchasers of phosphate detergents in this area outside Chicago are not affected by the ordinance. Other jurisdictions in the Chicago marketing zone also have limitations on phosphate detergents. Purchasers in these areas are restricted by their own local legislation. And in the areas without such legislation phosphate detergents assumedly will be available at those stores which are not part of these chains. Two of the seventeen chains chose to carry phosphate formula detergents, so such products will also be available at those stores. While there might be people who cannot buy phosphate detergents in their own towns, the foregoing factors tend to lessen the burden. Indeed, there is the possibility

that manufacturers might be able to "drop-ship" directly from the plant to stores in some areas. Although this might not be the customary or most economical procedure, Procter and Gamble distributes its products in this manner for about one percent of its total business.

We are troubled by the contention that these large warehouses absolutely refuse to stock two formulas of the same detergent. Procter and Gamble and the other two large detergent manufacturers are huge companies that could exert at least some "leverage" on these warehouses. Admittedly, there is testimony that Procter and Gamble has tried to convince them to handle both and has had very limited success. But we wonder whether such leverage would not increase when this lawsuit is not a consideration. One would think that the grocery chains would have an incentive to carry both types of detergents in order to compete with those stores selling what Procter and Gamble claims is the "superior" detergent formula.

We are not totally persuaded by the grocery chains' explanation of why only one type of detergent can be stocked. The major reason presented is lack of space. But it would seem that the total number of boxes of detergents sold would be about the same whether two formulations or only one are offered. The aggregate supply of cartons kept in the warehouse would not increase unless it is necessary to maintain the same amount of product in stock even though less of it is being sold. It is not clear from the record why more actual space in the warehouse would be necessary if the same number of cartons is separated into two types rather than one. Possibly, the explanation is due to the limited availability of warehouse slots which, in at least some warehouses, are metal racks. But again the record does not show why the slots that are used for detergents cannot be split into two smaller slots that could accommodate the stock necessary for each type of detergent, assuming the total number of boxes in stock has not changed.

Nor can we unquestionably accept the contention that carrying both types of detergents would result in a great risk of accidental shipments to and sale of phosphate detergents by stores within Chicago in violation of the ordinance. If this were the only concern we are sure that some procedure could be arranged to minimize this possibility. For instance, the cartons that contain boxes of phosphate could be made a different color so they would be easily distinguishable. Certainly under such a procedure the employees of the individual stores could recognize a mistake and not sell the illegal detergent.

We recognize that the Chicago ordinance combined with the grocery warehousing practice can result in interfering with the full distribution of phosphate detergents to areas outside of Chicago. But many of these consumers would probably have access to such products either at other stores or at chain stores that might receive drop-shipments. Our analysis has indicated that if there was sufficient demand it might even be possible that all the large warehouses would carry phosphate detergents. Overall, we conclude that the ordinance's effect on full access to certain products by consumers in parts of other states can only be classified as a slight burden on interstate commerce.

## III

Having determined that the ordinance does impose some burden on interstate commerce, we are required to consider whether the interest sought to be served by the legislation is a legitimate local concern. As with most cases of this type, the goal of this legislation can be stated in its ultimate terms—protection of health and welfare. For purposes of our analysis, we believe that it would be more useful to express the objective simply as the prevention and elimination of nuisance algae. This is an environmental objective toward which local legislation may probably be aimed. In broad terms this legislation is part

of the overall attack on the problem of water pollution. Though there is federal intervention in this general area, this does not prevent local attempts to deal with one of our most immediate and difficult problems.[18] As the Supreme Court has said in regard to a city's power to enact legislation designed to curb pollution:

> In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government.[19]

Indeed, Congress appears to have specifically encouraged such local legislation.[20] The Federal Water Pollution Control Amendments of 1972 provide:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirements respecting control or abatement of pollution.[21]

Moreover, as noted earlier, there are no discriminatory aspects associated with this purpose that might invalidate it. The objective is legitimately local and non-discriminatory which means that it may properly be the end toward which local legislation is addressed.

Finally, we see no problem in the fact that the ordinance is aimed, at least in part, toward nuisance algae

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[18] There is no contention in this case that this particular area of legislation has been preempted by Congressional action.

[19] *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 442 (1960).

[20] The relevance of such Congressional encouragement has been recognized in *Parker* v. *Brown*, 317 U.S. 341, 367-68 (1943).

[21] 33 U.S.C. § 1370 (Supp. II, 1973).

downstream from Chicago. We agree with the conclusion of the district court that the City can be legitimately concerned with preventing any damage to its neighbors caused by Chicago's actions.

## IV

We are now at the stage where we must determine whether the ordinance is a reasonable means of reaching the end desired. We have previously concluded that the burden on interstate commerce that results from this ordinance is slight and the objective of this legislation is legitimate. We hold that the burden is so slight compared to the important and properly local objective that the presumption we discussed earlier should apply. We will accept the City Council's determination that this phosphate ban is a reasonable means of achieving the elimination and prevention of nuisance algae unless we find that the plaintiffs have presented clear and convincing proof to the contrary.[22]

We discuss first the Illinois Waterway because this is the heart of the factual controversy. An initial consideration is whether there is presently a nuisance algae problem in the Illinois River. The City did introduce some testimony and photographs indicating the existence of excessive algae blooms in the Illinois River. But the plaintiffs presented credible evidence to the effect that presently there is no nuisance algae growth in the Waterway. The district court concluded that there was no "significant" growth. We can at least assume that there is some

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[22] We note that even if it is a relevant consideration at this point, there is not a reasonable and less burdensome alternative way to eliminate phosphates from the sewage effluent. Elimination of phosphates by means of sewage treatment is too costly and requires too great a waste of chemicals to be deemed a constitutionally mandated alternative. *See generally Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951).

nuisance algae and the possibility of more in the future, since there was no convincing proof that such an increase will not occur. The testimony that the excessive turbidity and flushing quality of the river prevent algae blooms is far from conclusive. Indeed there are apparently some nuisance algae at present. The inhibitory factor might be a nutrient other than phosphorous that will greatly increase in concentration. The prospect for the future is unknown.

The crux of the matter is actually the question of whether the phosphorous level in the Waterway will ever be relevant to the control or removal of nuisance algae. We do not believe that the plaintiffs have met their burden of showing convincingly that limiting the quantity of phosphorous can never be the key to the problem. Admittedly, the evidence seems clear that phosphorous is not the "limiting factor" in the Waterway at this time. Moreover, even with the elimination of detergent phosphates from the Chicago sewage effluent, the phosphorous level would not reach the limiting point. The Chicago ordinance, by itself, would have no immediate effect on the Waterway. This does not indicate, however, that the ordinance is not a means of dealing with nuisance algae. The plaintiffs introduced evidence to show that the amount of phosphorous in the Illinois River could greatly increase without increasing nuisance algae. Even if this is true, it only proves that phosphorous is presently not the "limiting nutrient." It does not prove that phosphorous might not be the "limiting nutrient" at some point in time. Indeed, Chicago's ordinance appears to be a significant first step toward that goal. We do not agree with the district court that it can only be enacted on a stand-by basis. If this were the law, all programs aimed at eliminating phosphorous from the Waterway would have to be enacted at the same time. We can assume that other communities might follow Chicago's lead and prevent phosphate detergents. Nor do we think that there was clear evidence that if all

phosphorous from detergents were eliminated there would still be other uncontrollable sources that would keep the level above the limiting point. There was testimony that indicated that agricultural run-off of phosphorous can be controlled. For Commerce Clause purposes the City Council was justified in believing that eventually its phosphate ban, in conjunction with other actions, would result in eliminating and preventing nuisance algae in the Illinois Waterway.

The effectiveness of the legislation is also shown, to some extent, by the evidence concerning Lake Michigan.[23] There is no question that both eutrophication and phosphorous are serious problems in regard to Lake Michigan. Though Chicago might contribute relatively little phosphorous to the lake, the phosphorous level is at such a precarious point that even this minimal amount takes on added importance. Further, contrary to the district courts view, we find that Chicago has a legitimate interest in banning phosphate detergents as an example for other communities presently releasing their sewage into Lake Michigan. Chicago is attempting to convince these communities to control their phosphate discharge into the lake. Chicago could reasonably decide that it would be aided in this endeavor if it could show these other jurisdictions that Chicago is willing to endure whatever hardships may be associated with the loss of phosphate detergents. Given the other aspects of the legislation that support its presumption of effectiveness, we need not reach the question of whether this hortatory element by itself could support

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[23] The City has argued in its brief that the ordinance also helps Lake Michigan because it has the result of preventing other areas from receiving phosphate detergents too, and thus these areas are forced to control their discharge of phosphorous into the Lake. We totally reject the contention that the effectiveness of the ordinance can be supported on the basis of this extraterritorial coercion. We do not believe that the City Council considered this possibility and we in no way rest our decision on this argument.

the conclusion that the ordinance provides a means sufficiently effective to be declared constitutional. Based on all the evidence the presumption afforded the City Council's judgment has not been overcome.

This case has presented a very difficult constitutional problem. On the basis of the above analysis we have resolved the question in favor of the constitutionality of the ordinance. Accordingly, the judgment of the district court is reversed.

## APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DISTRICT

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THE SOAP AND DETERGENT ASSOCIATION, THE PROCTER AND GAMBLE COMPANY, FMC CORPORATION, MONSANTO COMPANY, and AMWAY CORPORATION, *Plaintiffs,*

v.

THE CITY OF CHICAGO, *Defendant.*

---

DECISION and ORDER

This case came on for trial on a declaratory action brought by an association and four of its members engaged in manufacturing detergents and phosphates. Plaintiffs seek to set aside an ordinance of the City of Chicago which since June 30, 1972 has made it a criminal offense to sell detergents containing phosphorus within the City. Phosphorus is the element from which phosphates are made and phosphates are a principal ingredient of most detergents. Hence detergent products sold in Chicago must now be made with substitutes for phosphates.

Plaintiffs Soap and Detergent Association, Monsanto Company and Amway Corporation have failed to prove the jurisdictional amount required by 28 U.S.C. § 1331, and their complaints will be dismissed. The remaining plaintiffs, The Procter and Gamble Company, a detergent manufacturer, and FMC Corporation, a phosphate manufacturer, have proved that well in excess of $10,000 is involved in their cases, and diversity is not contested.

The ordinance in question was adopted by the City Council on October 14, 1970 upon the recommendation of its Committee on Environmental Control which had held public hearings on the matter for three days. The Committee did not make a written report and the City Council made no findings or declarations of policy, so the specific bases for the ordinance became known only in the course of this litigation. The court ruled at the close of the plaintiffs' case that it had produced sufficient evidence to require the City to justify the ordinance.

We now find and conclude that the City failed to sustain this burden, under the particular facts and circumstances of this case, and that the two remaining plaintiffs are entitled to the declaratory and injunctive relief prayed for. The evidence is largely technical and too voluminous to summarize in detail, but the court finds the following controlling facts have been proved.

The ordinance provides in pertinent part as follows:

> § 17-7.3(b) It shall be unlawful for any person, firm, or corporation to sell, offer or expose for sale, give or furnish any synthetic detergent or detergent containing any phosphorus, expressed as elemental phosphorus, including synthetic detergents or detergents manufactured for machine dishwashers, dairy equipment, beverage equipment, food processing equipment and industrial cleaning equipment, within the City of Chicago from and after June 30, 1972.
>
> § 17-7.4 *Penalties.* Any person found guilty of violating, disobeying, omitting, neglecting, or refusing to comply with, or resisting or opposing the enforcement of any of the provisions of this Article VII, . . . upon conviction thereof shall be punished by a fine of not less than one hundred dollars ($100.) nor more than $300.00 for the first offense, and not less than $300.00 nor more than $500.00 for the second and each subsequent offense, in any 180-day period, or shall be punishable as a misdemeanor by incarceration in the county jail for a term not to exceed six months under procedures set forth in Section 1-2-1.1 of the Illinois

> Municipal Code (Ill. Rev. Stat. 1969, ch. 24, par. 1-2-1.1) as amended, or by both fine and imprisonment. A separate and distinct offense shall be regarded as committed each day on which such person shall continue or permit any such violation, or failure to comply is permitted to exist after notification thereof.

Similar ordinances have been adopted by various jurisdictions, state and local, in widely separated areas of the United States. As of September 1972, four small municipalities neighboring Chicago, and also the unincorporated area of Lake County, Illinois prohibit the sale of detergents containing any phosphorous. Other neighboring jurisdictions, including the states of Indiana and Michigan, limit the phosphorus content to 8.7%. Several municipalities have repealed or delayed the effective date of their ordinances, and most of the other municipalities surrounding Chicago have no restrictions on the sale or use of phosphate detergents.

Nationwide, a patchwork pattern of ordinances and laws has grown up over the past three years ranging from complete prohibition of phosphate detergents in Dade County, Florida, Erie County (Buffalo), New York, and two additional states outside of the Mid-West, an 8.7% limitation in many other localities, and no controls elsewhere. These laws and ordinances have become too numerous and diverse to summarize beyond the date of the stipulation of the parties dated September 26, 1972. The task of complying with and contesting this rash of legislation has required considerable attention of the industry, one corporate official testifying that he spends a day a week on the problem. Members of the industry or its association have spent several millions of dollars to develop a substitute for phosphate in detergents, but none of these efforts have yet been successful. Consequently, in many areas plaintiffs have replaced all or most of the phosphorus content of detergents with soda ash, a less effective and cheaper component.

Plaintiffs contend that detergents containing phosphorus are a useful and harmless product and that the City's ordinance unreasonably and unjustifiably interferes with their normal distribution and sale of these products in interstate commerce. The original complaints also alleged unconstitutional discrimination and a violation of the plaintiffs' right to due process, among other things, but on October 30, 1972 they filed a Second Amended Complaint which was limited to an alleged violation of the Commerce Clause of the Constitution of the United States (Article I, Section 8, Clause 3). Plaintiffs seek a declaration that the ordinance is unconstitutional and to enjoin its enforcement.

The City contends that the ordinance is justified to protect the Illinois Waterway into which the Metropolitan Sanitary District discharges the City's sewage effluent and also to protect the City's water supply which comes from Lake Michigan. It contends that phosphates unduly accelerate the natural eutrophication of both of these bodies of water and would be unreasonably expensive to remove by sewage treatment. Since detergents contribute approximately 50% of the phosphates in Chicago's sewage effluent, it asserts that it has the power and the right to prohibit the introduction of this element into the system, despite any interference that this may have on interstate commerce. In short the City argues that the benefits resulting from the ordinance outweigh any disadvantage to the plaintiffs or their customers, including housewives and businesses using detergents. It is worth noting that none of these groups nor any of the communities which depend on the two bodies of water have sought to intervene in this case.

The City does not contend that it has the right to prohibit the sale of safe and useful products within its confines, and plaintiffs do not contend that they have the right to distribute and sell a product in interstate com-

merce which damages the public's water. The principal issues therefore are whether the ordinance does interfere with the free flow of interstate commerce and, if so, whether this is justified by the benefits realized by the ordinance. The parties have offered their evidence in a commendably thorough and forthright manner, so that the court has been greatly assisted in deciding this case on a much more complete record than was presented to the Committee on Environmental Control of the Chicago City Council.

There can be no doubt that local governments have the right to enact laws for the protection of the public, even to the extent of regulating or excluding certain undesirable activities from interstate commerce. For example, the State of Florida can forbid the interstate shipment of inedible or immature citrus fruit in order to protect its industry's reputation. *Sligh* v. *Kirkwood, Sheriff of Orange County, Florida,* 237 U.S. 52 (1915). Trucks over a certain size and weight were held to be properly excluded by one state in order to protect its highways. *South Carolina Highway Department* v. *Barnwell Brothers,* 303 U.S. 177 (1939). A smoke ordinance of the City of Detroit was justified as a health measure even though it burdened interstate navigation. *Huron Portland Cement Company* v. *City of Detroit,* 362 U.S. 440 (1960). In these and similar cases the local interests protected by the laws in question were found to justify the reasonable exercise of local police powers.

On the other hand, the State of Illinois cannot require interstate trucks to use specially designed mudguards when this is not reasonably necessary for the protection of its citizens. *Bibb* v. *Navajo Freight Lines,* 359 U.S. 520 (1959). Arizona cannot require its melons to be packaged within the state if this is primarily for the purpose of creating a local enterprise. *Pike* v. *Bruce Church, Inc.,* 397 U.S. 137 (1970). And the State of New York, in order to protect local economic interests, cannot refuse to issue a permit

for a plant to produce milk in New York to be shipped to Boston. *H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525 (1949). In all of the foregoing cases, the state and local laws were held to be an impermissible interference with interstate commerce because they were not shown to be sufficiently necessary for the health, safety or welfare of the local citizenry.

Modern-day detergents were developed and patented after World War II by chemists who discovered that phosphates when combined with other materials would clean better than soap, particularly in hard water. Detergents contributed to the development of the automatic washing machines and dishwashers, and the two complementary lines of products flourished. Detergents soon outstripped soap in volume and now contribute gross sales exceeding $2,000,000,000 a year to the economy.

The evidence is clear that a detergent made with phosphate is a more effective cleaning agent than non-phosphate detergents when used with Chicago's water and is not at all harmful to the persons using it or wearing clothes or eating from utensils washed in it. In the form of phosphates, phosphorus constituted 12.3% of Procter and Gamble's leading detergent, Tide, and up to 25% of some phosphate detergents, before the ordinance required a reformulation. Phosphorus is a natural and benign element appearing to a greater or lesser extent in all living organisms, including the human body.

Besides establishing beyond question that phosphate detergents are not only safe but also beneficial to the users, plaintiffs also proved that the prohibition of the sale of these products in the City of Chicago seriously disrupted the flow of interstate commerce. The normal distribution system which developed for detergents is area-wide, not city-wide. They are manufactured in plants located in various cities in the Mid-West and then sold to major chain stores and similar distributors. In the Chicago area these

purchasers store their products in warehouses and distribute them when needed to retail stores throughout Northern Illinois and Indiana, and Southern Wisconsin and Michigan. The proprietors of these warehouses, who are customers of the plaintiff manufacturer, have adamantly refused to carry two or three formulations for each of the 275 varieties of detergents because this would double or triple the number of "slots" which would be required. Furthermore they refuse to incur the risk of becoming exposed to heavy fines by mistakenly delivering detergents with phosphates to stores in Chicago. The undisputed evidence is that 15 of the 17 major customers of Procter and Gamble servicing Chicago and environs chose to carry only non-phosphate detergents after June 30, 1972 and the two which carry two formulations sell and distribute primarily outside of the City.

The result is that the plaintiffs' normal manufacturing and distribution processes had to be drastically revised because of the Chicago ordinance. Some of the plants which had manufactured only one detergent formulation now must be scheduled to manufacture two; other plants have been devoted to manufacturing non-phosphate detergents which had previously manufactured for a much larger area. This requires obtaining raw materials from different sources, shutting down the plants more frequently for cleaning and change-over operations, changing shipping patterns to accommodate the Chicago market, and many other uneconomical makeshifts. The plaintiff Procter and Gamble Company estimates that its shipping costs for raw materials and finished products have been increased $2,500,000 a year due to the changed production arrangements required for the Chicago area. It did not sell any detergents in the Chicago area for five months after June 30, 1972 because it did not make a satisfactory non-phosphate detergent, thereby losing approximately $4,-700,000 in sales. It has completely withdrawn a tablet detergent from the Chicago market because of inability

to formulate it effectively without phosphate. Plaintiff FMC Corporation has lost sales of phosphates amounting to about $500,000 a year to its customers selling in the Chicago area.

The court does not consider relevant whether it is more profitable to manufacture the non-phosphate detergents; the question is whether the plaintiffs have the right to sell and ship a harmless product in interstate commerce. The evidence of increased costs of manufacture and distribution, however, is relevant to show a burden on interstate commerce. It then becomes the task of the defendant City to justify its ordinance by showing at least some need to protect the public health, safety or welfare. This need is not measurable in dollars and cents but can be weighed equitably against the plaintiffs' right to free trade. E.g., *Bibb* v. *Navajo Freight Lines, supra.*

The City's justifications for the ordinance were of an indirect nature, to the effect that excessive phosphates in sewage cause undesirable changes in the Illinois Waterway and in Lake Michigan. All of Chicago's sewage is collected and treated by the Metropolitan Sanitary District, an independent governmental entity. Most of this effluent is then channelled into the Sanitary and Ship Canal which enters the Des Plaines River at Lockport and then becomes the Illinois River. Only a very small amount of phosphates are removed by the Metropolitan Sanitary District and none is removed intentionally except at one plant. Another plant is under construction which will remove phosphate from effluent discharged into the Fox River and thence into the Illinois. Phosphates will be removed by that plant in order to comply with the proposed regulation of the Illinois Pollution Control Board, but the Metropolitan Sanitary District has officially opposed any requirement that it remove phosphates from sewage. Nor is there any limit set by the Illinois Pollution Control Board on the amount of phosphate which can be discharged into the Illinois River.

Phosphate in water is not itself a pollutant. Some communities add it to water in the purification process for the purpose of softening. Excessive phosphates in the sewage effluent, however, can cause nuisance algae to flourish, resulting in a deterioration of the fish species, an unpleasant odor from decaying algae, and a bad taste in the water when used for drinking. The long-range effect of nuisance algae is to accelerate natural eutrophication and, by over-abundance, to ultimately destroy the value of a body of water. This has happened in parts of Lake Erie.

The weight of the evidence showed that there was no significant amount of nuisance algae in the Illinois River before the ordinance was passed and consequently that the ordinance was not required for this objective. Neither the State of Illinois nor the Federal government nor any municipality or person along these rivers requested this ordinance or testified in its support before the City Council's Committee or in this court. In fact scientists of the State of Illinois and Missouri testified in the case at bar that nuisance algae was no problem in the Illinois and Mississippi Rivers, and no evidence was offered of algae in the waterways above the Illinois River.

The reason for the lack of nuisance algae in the Illinois and Mississippi Rivers is apparently attributable to such causes as excessive turbidity, the periodic flushing of the river by high water, and the presence of some undefined trace elements which inhibit the growth of algae. More to the point, however, is the fact that the Illinois and Mississippi Rivers are so overloaded with phosphates that the removal of phosphates from detergents can have no effect on their plant or fish life. These rivers carry a higher percentage of phosphates than any other river in the United States, contributed by leaves and other natural sources, agricultural fertilizers, industrial effluent, human wastes and detergents. As a result the Illinois River at

Peoria contains at least 25 times as much phosphate as is necessary to sustain nuisance algae, of which the Chicago detergents contributed approximately 25%. The maximum or "limiting" amount of phosphate which nuisance algae can use is about .02 milligrams per liter; any amount above this is surplus, having no effect on the growth of algae.

According to intensive samplings made by the Illinois State Water Survey, the Illinois River at Peoria before the Chicago ordinance became effective contained a minimum of .5 milligrams of phosphate per liter and averaged 1.5 milligrams. After the ordinance went into effect, the lowest phosphate count was .025 milligrams per liter and the average was .5, still far above the limiting factor for nuisance algae. Although these measurements were taken some miles downstream from Lockport, the witness expressed the scientific opinion that 75 to 80% of Chicago's phosphates continue in the stream down to Peoria and that the loss is more than regained by contributions added by industry, sewage and other factors below Lockport. Nonetheless he testified that there was no nuisance algae in the Illinois River and that phosphates did not damage or threaten its water. Even the defendant's witnesses admitted that phosphates are not a limiting factor for nuisance algae at any place down to and including the Gulf of Mexico, before or after the ordinance.

After the ordinance had been in effect for four months, one of the plaintiffs' witnesses took a quantity of water from the Illinois River at two spots downstream from Lockport and grew algae in it under laboratory conditions. He found that the re-introduction of phosphates had no discernible effect on the growth of algae in this particular water but that the addition of nitrogen did. He concluded that the elimination of phosphates from detergents had had no effect on the growth of algae and was not justified for this objective.

By the time of trial, the Chicago ordinance had been in effect for almost six months, and an earlier provision of the ordinance, reducing phosphorus in many detergents to 8.7%, had been in effect since February 1, 1971. The plaintiffs and all other manufacturers of detergents have apparently complied fully with the ordinance, and as a result the amount of phosphates in the effluent of the Metropolitan Sanitary District has decreased markedly. The defendant therefore had the benefit of an actual test period after February 1, 1971, but it offered no evidence of any change in the alleged algae in the rivers. The only evidence of tests after the effective dates of the ordinance was the plaintiffs' witness who testified convincingly that the ordinance had no effect.

The City of Chicago introduced a series of aerial photographs into evidence which purported to show algae growth in the Illinois River at various places. These were taken during the hearings conducted by the Committee on Environmental Control in the summer of 1970 but were not accompanied by any physical inspections or analysis of the substances or water. Although the photographs were quite impressive at first sight, the plaintiffs demonstrated that most of them were taken at sites along the Illinois River where tributaries containing nuisance algae flowed into the Illinois. The photographs therefore were not of sufficient weight to establish a justification for the ordinance.

The plaintiffs contended, at least in the earlier stages of this litigation, that the City of Chicago has no power or authority to protect the water quality for persons who live downstream. Although it is true that the City cannot legislate beyond its boundaries, it does have the right, indeed the obligation, to prevent its activities from damaging its neighbors. Cf. *Sligh* v. *Kirkwood, Sheriff of Orange County, Florida,* 237 U.S. 52 at p. 60 (1915). Just as Chicago is not privileged to dump raw sewage into the Illinois River, so likewise it cannot lawfully dump other pollutants into

the waterways or air. This is not a jurisdictional problem, it is a question of controlling nuisances, and the City undoubtedly has the power to do this.

On the other hand, the City cannot interfere with interstate commerce merely for hortatory purposes, to influence other cities to refrain from discharging phosphates into Lake Michigan. The concentration of phosphates in the Lake is far lower than in the Illinois River, approximately at the limiting amount of .02 milligrams per liter, and the danger of nuisance algae is therefore much more real. The Lake does not have the turbidity or flushing antidotes found in the rivers, and the excessive discharge of phosphates into the Lake can actually cause the bad results which the City contends have occurred in the Illinois Waterway.

The City has not shown that any appreciable amount of sewage from Chicago gets into Lake Michigan, however. The only places where Chicago sewage is known to enter the Lake on occasion is from the Chicago River and the Calumet River. Both of these rivers now flow away from the Lake, and their reversal into the Lake is controlled by locks. During excessively heavy rainstorms these two rivers can be allowed to flow into the Lake as a safety valve to relieve over-loading of the Metropolitan Sanitary District facilities. However, this has only occurred from the Chicago River on two occasions in the last ten years and on two other occasions from the Calumet River during the same decade. The amount of discharge into the Lake is not accurately measured, but it has been relatively minimal, usually much less than 200,000,000 cubic feet on each occasion. The back-flow contains only about 45% of raw sewage and a proportionately smaller amount of phosphate. The amount of phosphate actually discharged into the Lake by these occasional back-flows is not contained in any measurements made by the City or by the Metropolitan Sanitary District, but we conclude from the evi-

dence that in the years of serious back-flows, detergents contribute not more than 250 tons of the 15,000,000 pounds of phosphates dumped into the Lake each year, approximately 3%. Thus this secondary justification for the ordinance is found to be insufficient.

We believe that the Chicago detergent ordinance was enacted in good faith and for laudatory objectives, and that a legislative enactment should not be interfered with by the courts unless clearly required. Nevertheless we find and conclude that Section 17-7.3(b) of the Chicago ordinance, prohibiting the sale of detergents containing any phosphorus, constitutes an unjustified interference with interstate commerce and therefore violates Article I, Section 8, Clause 3 of the United States Constitution. This does not necessarily mean that similar ordinances in other jurisdictions cannot be sustained, where the effects of discharging phosphates into the public water supply may outweigh the interference with interstate commerce. It is also possible that area-wide legislation or regulation may reduce the phosphate contributions into the Illinois Waterway to a level where detergents should be controlled similarly with other sources of phosphates, but this is not contemplated even under the Federal Water Pollution Control Act until July 1, 1977 at the earliest. (P.L. 92-500, Section 301(b)). Until plenary jurisdictions take action to control all phosphates down to the limiting level so that phosphates from detergents then might have some effect on the Illinois Waterway, the City of Chicago should adopt no more than a stand-by ordinance, to become effective if and when this level is approached.

If Section 17-7.3(b) of the Municipal Code prohibiting the sale of detergents containing any phosphorus is stricken, then Section 17-7.3(a) which limits sales of detergents to those containing less than 8.7% phosphorus would remain, theoretically. However, it is apparent that even this lesser restriction has insufficient legal justification and

would have substantially the same effect on interstate commerce as does the total ban. Furthermore the intent of the City Council seems to have been to supersede the 8.7% requirement by the total ban, thus terminating the former requirement by June 30, 1972. Thus Section 17-7.3(a) also fails, both as a matter of statutory construction and as a matter of constitutional law, and with these two sections void, the entire ordinance, including the labelling and enforcement provisions, are of no effect.

The court reserved ruling on some of the documents offered during trial and in depositions. The objections to plaintiffs' exhibits 13 and 14 are sustained. The objections to defendant's exhibits 6, 39, 42, 46, 51, 52, 53, 54 and 55 are sustained. The objections to defendant's exhibits 26, 27, 28 and 29 are overruled. 28 U.S.C. § 1733.

Plaintiffs are ordered to submit a final judgment order, agreed to in form, in accordance with the foregoing findings and conclusions to be presented in open court on March 9, 1973 at 10 a.m. At that time the parties may bring up any other matters which they consider necessary for the final disposition of this case.

## APPENDIX C

### STATUTES INVOLVED

### City of Chicago Code 17-7.1—7.4 (1973)

SECTION 17-7.1. *Definitions.* (a) The term "synthetic detergent" or "detergent" means any cleaning compound which is available for household use, laundry use, other personal uses or industrial use, which is composed of organic and inorganic compounds, including soaps, water softeners, surface active agents, dispersing agents, foaming agents, buffering agents, builders, fillers, dyes, enzymes and fabric softeners, whether in the form of crystals, powders, flakes, bars, liquids, sprays, or any other form.

(b) The term "polyphosphate builder" or "phosphorus" means a water softening and soil suspending agent made from condensed phosphates, including pyrophosphates, triphosphates, tripolyphosphates, metaphosphates and glassy phosphates, used as a detergent ingredient, but shall not include "polyphosphate builders" or "phosphorus" which is essential for medical, scientific or special engineering use under such conditions and regulations as may be prescribed, after hearing, by the Commissioner of Environmental Control.

(c) The term "recommended use level" means the amount of synthetic detergent or detergent which the manufacturer thereof recommends for use per wash load, at which level said synthetic detergent or detergent will effectively perform its intended function.

(d) The term "machine dishwasher" means equipment manufactured for the purpose of cleaning dishes, glassware and other utensils involved in food preparation, consumption or use, using a combination of water agitation and high temperatures.

(e) The terms "dairy equipment," "beverage equipment" and "food processing equipment" mean that equip-

ment used in the production of milk and dairy products, foods and beverages, including the processing, preparation or packaging thereof for consumption.

(f) The term "industrial cleaning equipment" means machinery and other tools used in cleaning processes during the course of industrial manufacturing, production and assembly.

SECTION 17-7.2. *Labeling.* It shall be unlawful for any person, firm or corporation to sell, offer or expose for sale, give or furnish any synthetic detergent or detergent, whether in the form of crystals, powders, flakes, bars, liquid, sprays, or any other form, in the City of Chicago from and after February 1, 1971, unless the container, wrapper or other packaging thereof shall be clearly labeled with respect to its polyphosphate builder or phosphorus ingredient content clearly and legibly set forth thereon in terms of percentage of phosphorus by weight, expressed as elemental phosphorus per container, wrapper or other packaging thereof, as well as grams of phosphorus, expressed as elemental phosphorus, per recommended use level.

SECTION 17-7.3. *Limitations.* (a) It shall be unlawful for any person, firm or corporation to sell, offer or expose for sale, give or furnish any synthetic detergent or detergent containing more than eight and seven/tenths percent (8.7%) of phosphorus by weight, expressed as elemental phosphorus, within the City of Chicago from and after February 1, 1971. It shall also be unlawful for any person, firm or corporation to sell, offer or expose for sale, give or furnish any synthetic detergent or detergent which requires a recommended use level of said synthetic detergent or detergent which contains more than seven grams (7 gms.) of phosphorus by weight expressed as elemental phosphorus, within the City of Chicago from and after February 1, 1971. Notwithstanding the foregoing provisions of this

Section 17-7.3(a), synthetic detergents or detergents manufactured for use in machine dishwashers, dairy equipment, beverage equipment, food processing equipment and industrial cleaning equipment shall not be subject to the limitations herein set forth, but are hereby made expressly subject to the provisions of Section 17-7.3(b).

(b) It shall be unlawful for any person, firm or corporation to sell, offer or expose for sale, give or furnish any synthetic detergent or detergent containing any phosphorus, expressed as elemental phosphorus, including synthetic detergents or detergents manufactured for machine dishwashers, dairy equipment, beverage equipment, food processing equipment and industrial cleaning equipment, within the City of Chicago from and after June 30, 1972.

(c) The concentration of phosphorus by weight, expressed as elemental phosphorus in any synthetic detergent or detergent shall be determined by the current applicable method prescribed by the American Society for Testing and Materials (A.S.T.M.).

SECTION 17-7.4. *Penalties.* Any person found guilty of violating, disobeying, omitting, neglecting, or refusing to comply with, or resisting or opposing the enforcement of any of the provisions of this Article VII, except when otherwise specifically provided, upon conviction thereof shall be punished by a fine of not less than one hundred dollars ($100.) nor more than $300.00 for the first offense, and not less than $300.00 nor more than $500.00 for the second and each subsequent offense, in any 180-day period, or shall be punishable as a misdemeanor by incarceration in the county jail for a term not to exceed six months under procedures set forth in Section 1-2-1.1 of the Illinois Municipal Code (Ill. Rev. Stat. 1969, ch. 24, par. 1-2-1.1) as amended, or by both fine and imprisonment. A separate and distinct offense shall be regarded as committed each day on which such person shall continue or permit any

such violation, or failure to comply is permitted to exist after notification thereof.

**Article I, section 8, clause 3 of the Constitution of the United States.**

SECTION 8. The Congress shall have Power

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

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No. 74-1109

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THE PROCTER AND GAMBLE COMPANY and FMC CORPORATION, *Petitioners,*

v.

THE CITY OF CHICAGO, *Respondent.*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## BRIEF AMICUS CURIAE OF THE CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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On March 6, 1975, The Procter and Gamble Company and FMC Corporation petitioned this Court for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in the above-captioned case. Also on March 6, 1975, the Chemical Specialties

Manufacturers Association received from respondent City of Chicago its express consent to file this brief as an *amicus curiae* pursuant to Rule 42 of the Rules of the Supreme Court of the United States. Further, this brief is lodged with the express consent of petitioners.

## INTEREST OF THE AMICUS CURIAE

Chemical Specialties Manufacturers Association (hereinafter "CSMA") is a nonprofit membership corporation composed of approximately four hundred manufacturers, suppliers, packagers, distributors and marketers of chemical specialty products for household use. CSMA includes various divisions delineated according to product groups, including the aerosol, disinfectant, insecticide, waxes and polishes, detergent, and transportation products divisions.

The instant proceeding is of particular concern to CSMA's member companies, as well as to all manufacturers and distributors of consumer and agricultural commodities whose products are marketed in interstate commerce. The free flow of consumer products in interstate commerce is assured by the Commerce Clause of the Constitution.[1] However, in this case the decision of the Court of Appeals incorrectly restricts the application of the Commerce Clause to the means of transport, leaving consumer products subject to such burdens on movement as a state, county, or city may impose. The increasing and disparate local regulation of products and so-called pollutants has resulted in a patchwork of inconsistent distribution and marketing requirements for industry and businesses operating in interstate commerce. No federal court has construed

[1] U. S. CONST. art. I, § 8.

the Commerce Clause so narrowly as has the court below. See, *Chemical Specialties Manufacturers Association* v. *Lowery*, 452 F.2d 431 (2d Cir. 1971); *Chemical Specialties Manufacturers Association* v. *Clark*, 482 F.2d 325 (5th Cir. 1973). See also, *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 759 (1967). It is in pursuit of these concerns that CSMA lodges this *amicus* brief in support of the Petition for a Writ for Certiorari.

## QUESTION PRESENTED

Whether the Commerce Clause protects the interstate distribution of a common commodity from unreasonable local restraints.

## STATEMENT OF THE CASE

In overturning a district court injunction, the appellate court has held that the City of Chicago's ordinance barring the sale of phosphate detergents does not impose an undue burden on interstate commerce and that therefore the local ordinance is not constitutionally proscribed. The district court, after hearing, found that the ordinance unduly burdened interstate commerce by interfering with the normal operation of companies selling consumer products in interstate commerce. The appellate court simply disagreed, and incorrectly limited the Commerce Clause protections to interstate carriers and instrumentalities of transport. Slip Opinion at 10, *Procter and Gamble Co.* v. *City of Chicago*, No. 73-1650 (7th Cir., Jan. 15, 1975). The Court of Appeals did not disturb any of the findings of the district court, nor did it find a lack of support in the record for any findings. Rather, it fashioned a novel conclusion which strips the Commerce Clause of its vitality

and renders the interstate distribution of consumer products subject to the whimsical interference of every government instrumentality in the United States. The appellate court's conclusion is flatly inconsistent with the long series of decisions by this Court extending from *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824) through *Allenberg Cotton Co.* v. *Pittman*, — U.S. —, 42 L.Ed. 2d 195 (1974).

## REASON FOR GRANTING THE WRIT

**Contrary to the Decisions of This Court, the Court of Appeals Has Incorrectly Held that the Interstate Distribution of a Commodity Is Not Entitled to the Same Degree of Protection from Local Legislative Impediments to Its Free Flow as that Accorded Interstate Carriers and Instrumentalities of Transport.**

The crux of the appellate court's ruling is:

> . . . we are not confronted with a situation in which legislation has reduced the effectiveness of a means of transportation itself. In this context the ordinance is not a burden on interstate commerce, but is merely a "burden" on a company which happens to have interstate distribution facilities.
>
> * * *
>
> There is no impairment in the ultimate ability to transport in interstate commerce in the most efficient and economical manner possible. [Slip Opinion at 10, *Procter and Gamble Co.* v. *City of Chicago, supra.*][2]

By holding that because an instrumentality of transport is not involved, a burden on a company's interstate distribution facilities is not a burden on interstate commerce, the appellate court's opinion is flatly

[2] Also cited in Petitioners' Brief for Certiorari at A-10, A-11, *Procter and Gamble Co.* v. *City of Chicago*, No. 74-1109 (U.S., filed Mar. 6, 1975).

inconsistent with this Court's application of the Commerce Clause. *In Lemke v. Farmers Grain Company*, 258 U.S. 50 (1922), a local regulation was attacked by interstate distributors because it interfered with their method of purchasing, shipment and sale of grain in the usual course of business. The commodity was subject to an elaborate local system of grading and inspection. This Court held that the state legislation unduly burdened interstate commerce in its effect on the complainant's business. *Accord, Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 290-91 (1921); *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189 (1924).

This Court has consistently applied Commerce Clause protections to strike down burdensome local impediments to commodities moving in interstate commerce. In *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), this Court struck down local regulation which forced a commercial farmer to alter its interstate scheme of packaging and processing of farm produce. And very recently this Court reiterated that the Commerce Clause protection from local interference extends to any course of dealing in a commodity which traverses "a long interstate pipeline." *Allenberg Cotton Co.* v. *Pittman*, — U.S. —, 42 L.Ed.2d 195, 201 (1974).

In support of the proposition that Chicago's ban on phosphate detergents is not a burden on interstate commerce because it does not constitute legislation which reduces the effectiveness of a means of transportation itself, the Court of Appeals noted *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), and *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945). Neither *Bibb* nor *Southern Pacific* stands for the proposition that interstate carriers and instrumentalities

of transport are entitled to a greater degree of Commerce Clause protection from locally enforced impediments than are common commodities which are the subject of interstate distribution and marketing.

The scope and purpose of the Commerce Clause was described by this Court in *Hood & Sons* v. *DuMond*, 336 U.S. 525 (1949), and that philosophy was reiterated this Term in *Allenberg Cotton Co.* v. *Pittman*, *supra*, 42 L.Ed. 2d at 205:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by custom duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

The decision below cannot be reconciled with this Court's consistent view of the Commerce Clause and its application to goods in interstate commerce. The policy of free trade fostered by the Commerce Clause has been compromised by the appellate court's unjustifiable distinction between instrumentalities on the one hand which aid interstate transportation, and distribution facilities on the other which aid the interstate flow of goods and products. Contrary to this Court's decisions, the Court of Appeals has virtually insulated from future Commerce Clause challenges the operation of singular local legislation which impedes the free flow of consumer products commonly distributed in interstate commerce.

## CONCLUSION

For the foregoing reasons, the petition of The Procter and Gamble Company and FMC Corporation for the issuance of a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT L. ACKERLY
CHARLES A. O'CONNOR, III
JOE G. HOLLINGSWORTH
1625 K Street, N.W.
Washington, D.C. 20006

*Attorneys for the Chemical Specialties Manufacturers Association*

*Of Counsel:*

SELLERS, CONNER & CUNEO
1625 K Street, N.W.
Washington, D.C. 20006

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

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No. 74-1109

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THE PROCTER AND GAMBLE COMPANY AND FMC CORPORATION, *Petitioners,*

v.

THE CITY OF CHICAGO, *Respondent.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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## BRIEF AMICUS CURIAE FOR THE SOAP AND DETERGENT ASSOCIATION

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This brief *amicus curiae* is filed by the Soap and Detergent Association (SDA) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

### INTEREST OF THE SOAP AND DETERGENT ASSOCIATION

The Soap and Detergent Association is a national trade organization representing the manufacturers of

over 90 percent of the soap and detergents produced in the United States each year and their suppliers of raw material. Its more than 120 members include both the large and small factors in the industry.

It is these companies, most of which either utilize or produce phosphates, which are the targets of the ordinance challenged herein and it is these companies whose operations in interstate commerce are shackled by the patchwork pattern of regulation found by the trial court and described at p. 8, n. 5, *infra*. Petitioner Procter & Gamble has demonstrated the constitutionally significant costs imposed on it by the Chicago ordinance. SDA files this brief *amicus curiae* in order to put before the Court the additional insights available to it as the representative of both large companies such as Procter and the smaller detergent manufacturers who are even less able to adapt their production and transportation patterns, and even more financially vulnerable to restrictive legislation.

## ARGUMENT

### The Decision Below Sanctions Local Regulations Which Unconstitutionally Burden That "Free Access to Every Market in the Nation" Which the Commerce Clause Was Adopted To Ensure.

The Petition for Certiorari demonstrates that the "compromise" between this Court's precedents which the Court of Appeals fashioned herein compromises away the essential safeguards which the Commerce Clause erected against any state or local "action which may fairly be deemed to have the effect of impeding the free flow of trade between States." *Freeman* v. *Hewit*, 329 U.S. 249, 252. Although we agree with, we

shall not echo that analysis. Rather, we shall concentrate on the details of the Court of Appeals' treatment of the burden issue, for this will reveal at each step a dilution of the very concept of "burden on commerce". If that Court's approach to the Commerce Clause is accepted, approval of not only the Chicago anti-phosphate ordinance, but of any restrictive local regulation is inevitable, and it matters not whether the rubric articulated is that the burden is only "slight" (cf. Pet. A-10, A-15),[1] or is "indirect", or is overbalanced by the importance of local interest involved (cf. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142).

1. We begin with the most obvious point. The Chicago ordinance absolutely forbids the sale of detergent products that contain phosphates. A more substantial interference with or burden on commerce than its total prohibition is logically inconceivable; yet the court below found "no merit" in the argument that this embargo burdens interstate commerce, because the "ordinance does not require that detergents be manufactured in Chicago or Illinois and does not benefit manufacturers who are located there" (Pet. A-12). But the view that the Commerce Clause protects interstate commerce only against discrimination in favor of local interests is untenable. As Mr. Justice Frankfurter explained in *Freeman* v. *Hewit, supra:*

> "This limitation on State power, as the Morgan case [*Morgan* v. *Virginia*, 328 U.S. 373] so well illustrates, does not merely forbid a State to single

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[1] "Pet." refers to the Petition for Certiorari herein. The opinions of the Court of Appeals and the District Court will be referred to as Pet. A-1 *et seq.* and Pet. B-1 *et seq.*, as reprinted in the Petition.

> out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance." 329 U.S. at 252.

When this Court struck down embargoes on liquor and oleomargarine in *Leisy* v. *Hardin*, 135 U.S. 100 and *Schollenberger* v. *Pennsylvania*, 171 U.S. 1, there was not even a whisper about discrimination in the opinions.[2] To be sure, these are old cases, but this reflects not a diminution of their authority, but the common understanding that legislation of this character could not survive constitutional challenge. By holding that a law which excludes from a state legitimate articles of commerce[3] raises only an issue of substantive due process (Pet. A-12), the decision below invites renewed local experimentation in restricting that "free access to every market in the Nation" which the Commerce Clause was adopted to ensure. *Hood* v. *DuMond*, 336 U.S. 525, 539.

2. The court below disapproved the District Court's holding "that the ordinance burdened interstate commerce by impairing the normal operation of companies having interstate sales and requiring these companies to create new, and less direct, shipping routes"

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[2] While two of the cases cited at Pet. A-12, n. 17 did involve discrimination against outsiders, the most recent of those cases, *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, did not, and militates strongly against the result reached below, see Pet. 15-16.

[3] *Sligh* v. *Kirkwood*, 237 U.S. 52, sustained a law which forbad export to other States of "impure foods, unfit for use", which were for that reason "not the legitimate subject of trade or commerce nor within the protection of the Commerce Clause of the Constitution" (*id.* at 59-60).

(Pet. A-10). The Court acknowledged "the fact that Procter and Gamble's plant in the Chicago area could not adequately supply its six-state area with detergents because the plant had to manufacture two lines of detergent products and thus reduce its capacity [so that] products had to be shipped to some of these states from plants which happened to be at different, and often further, locations" (*id.*). The precedents which establish that commerce was thereby burdened, were dismissed out of hand on the ground that this case does not "involve interstate carriers" (*id.*). The petition for certiorari conclusively demonstrates that the distinction between "a burden on interstate commerce" and "a 'burden' on a company which happens to have interstate distribution facilities" (*id.* A-10-11), while verbally facile, is constitutionally untenable. But for the opinion below it would never have occurred to us that such a demonstration would ever again be necessary, since this Court established in *Labor Board* v. *Jones & Laughlin,* 301 U.S. 1, 41-42, that "[w]hen industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities," they are subject to regulation under the commerce power precisely to prevent "interferences with that commerce".

Perhaps nothing in the opinion below so clearly signals the grave danger which the decision below portends for interstate commerce as does the argument that although the "effect of the ordinance is that the particular interstate systems of distribution used by Procter and Gamble and other detergent companies before the passage of the ordinance can no longer be used" (Pet. A-11), this is not an unconstitutional burden because it results from "the freely chosen geographical locations of their various plants" rather

than from "the requirements of this ordinance" (*id.*). While this reasoning successfully limits to its facts *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, it appears to run afoul even on its own factual assumptions of *Hood* v. *DuMond*, 336 U.S. 525, 539-540, where a similar argument was made by the State and rejected by this Court. And the "freely chosen" argument is utterly unrealistic: It assumes that if Procter and the Soap and Detergent Association's other members had possessed sufficient foresight, detergent plants could have been erected in a location in which the enactment of the Chicago antiphosphate ordinance would not have created substantial additional costs. Since that assumption is totally unwarranted,[4] the court's reason-

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[4] The additional production and transportation costs shown on this record arise of necessity if a plant is in a marketing area surrounded by some jurisdictions which allow, and others which forbid the use of phosphates. The variety of permissible detergent formulations that existing laws prescribe only compounds these problems. See Point 3, *infra*.

The record shows that the decison where to manufacture a particular product depends on a variety of factors, only one of which is the cost of transportation. On cross-examination Procter's Sales Manager was asked why a particular heavy-duty laundry detergent, Dash, is made in Cincinnati. He explained (R. 481):

> "In order to manufacture a particular product, it requires that you buy, install and run a certain amount of machinery, that you buy and store raw materials, that you employ the use of a high—in some cases of a high production detergent tower.
>
> Now, these detergent production facilities have optimum production rates; and when you turn them on, sometimes they produce a rather large volume of whatever it is you are making.
>
> To turn them off immediately, when you have made a small amount is a costly proposition.
>
> So, when you have a tower, in this instance in Cincinnati, in the Ivorydale plant, which can produce Dash in such quantities that it is more economic to make it in Cincinnati

ing must be rejected: "The commerce clause does not involve an exercise in the logic of empty categories." *Freeman* v. *Hewit, supra,* 329 U.S. at 254. And even if such a Shangri-La had been found, the companies' exercise of that "free choice" would inevitably have resulted in additional costs if other jurisdictions enacted restrictive legislation.

But we need not belabor the point, for there clearly is no merit in the court's constitutional theory that as long as there "is no impairment of the ultimate ability to transport in interstate commerce in the most efficient and economical manner possible" an ordinance which "might necessitate a change in certain production facilities, * * * does not rise to the level of an unconstitutional burden on interstate commerce" (Pet. A-11). As Mr. Chief Justice Hughes wrote in *Jones & Laughlin, supra,* 301 U.S. at 42:

> "And of what avail is it to protect the facility of transportation, if interstate commerce is throttled with respect to the commodities to be transported!"

3. The court below reasoned that an unconstitutional burden results only from actual, not potential, conflict of legislation in different jurisdictions (Pet. A-11-12), and further that the "importance of uniformity is not as great in the present type of case in terms of interstate commerce" as it is in "cases involving interstate carriers" (*id.* A-12). It was on these grounds that the

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and have the trans-shipment costs to Chicago than it would be to buy another expensive piece of equipment and duplicate the Ivorydale facilty in Chicago, and run them both at shorter intervals.

These complex factors change from brand to brand and geography to geography, but essentially that is the reason."

The loss of economies of scale is, of course, even more serious for the smaller producers.

court below rejected the plaintiffs' contention that the "rival, conflicting and angry regulations" of phosphates in detergents create an unconstitutional burden on interstate commerce.[5] While the immediate result raises practical problems of the utmost gravity to the Soap and Detergent Association and its members, the adverse impact of the court's holding is not limited to the industry which happens to be the target of the ordinance at issue in this case.

We address ourselves first to the court's statement that conflicting laws affecting production and merchandising are constitutionally more tolerable than conflicting regulations of transportation. This view

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[5] As the trial court found (Pet. B-3):

> "Similar ordinances have been adopted by various jurisdictions, state and local, in widely separated areas of the United States. As of September 1972, four small municipalities neighboring Chicago, and also the unincorporated area of Lake County, Illinois prohibit the sale of detergents containing any phosphorous. Other neighboring jurisdictions, including the states of Indiana and Michigan, limit the phosphorus content to 8.7%. Several municipalities have repealed or delayed the effective date of their ordinances, and most of the other municipalities surrounding Chicago have no restrictions on the sale or use of phosphate detergents.
>
> Nationwide, a patchwork pattern of ordinances and laws has grown up over the past three years ranging from complete prohibition of phosphate detergents in Dade County, Florida, Erie County (Buffalo), New York, and two additional states outside of the Mid-West, and 8.7% limitation in many other localities, and no controls elsewhere. These laws and ordinances have become too numerous and diverse to summarize beyond the date of the stipulation of the parties dated September 26, 1972."

This situation is constantly changing as States and their subordinate jurisdictions consider varying forms of anti-phosphate regulation. Bills which would forbid or limit the use of phosphate detergents are presently pending in the legislatures of approximately nine states and many subordinate jurisdictions.

ignores *National Bellas Hess* v. *Department of Revenue,* 386 U.S. 753, 759-760, as well as *Freeman* v. *Hewit, supra,* 329 U.S. at 256. And insofar as it confines the holdings of *Southern Pacific* v. *Arizona,* 325 U.S. 761, *Morgan* v. *Virginia,* 328 U.S. 373, and *Bibb* v. *Navajo Freight Lines,* 359 U.S. 520 to the transportation industry, the court succumbed to "the danger in our system of law which has grown up from concrete cases rather than from abstract reasoning, of using precedents as principles *per se* and not as illustrations of principle." Chafee, *Progress of the Law—Equitable Relief Against Torts,* 34 Harv. L. Rev. 388, 391 (1921). Here, the governing "principle [is] that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, * * * [and] has as its corollary that the states are not separable economic units." *Hood* v. *DuMond, supra,* 336 U.S. at 537-538. That "uniformity" is as essential to prevent serious impediments to the free flow of commerce" (*Southern Pacific, supra,* 325 U.S. at 775) in the marketing of products as it is in the operation of railroads and trucks, would seem to be sufficiently obvious to deserve judicial notice. In any event, this record amply demonstrates that in the detergent industry laws already enacted have diminished the economies of scale afforded by an unobstructed national market, since they require the production of chemically and physically different formulations for each of several kinds of cleaning products and the disruption of established distribution patterns.

In support of the view that only "actual conflict" is "relevant" the court below cited *Huron Portland*

*Cement Co.* v. *Detroit,* 362 U.S. 440, 448 (see Pet. A-12, n. 15). This Court there said:

> "And while the appellant argues that other local governments might impose differing requirements as to air pollution, it has pointed to none. The record contains nothing to suggest the existence of any such *competing or conflicting* local regulations." (emphasis added)

For purposes of the present case, it is sufficient that the challenge laid down in the *Detroit* case has been met on this record. And in broader terms, the Court of Appeals has sanctioned burdens on commerce which have previously been deemed intolerable, for it disregarded the *Detroit* opinion's reference to "competing" regulations, and treated as a "conflict" only the situation where obedience to one law would require "violation" of another (see Pet. A-11):

> "It is claimed that Milwaukee has an ordinance that not only restricts phosphates, but also prohibits highly alkaline detergents which have been used as substitutes for phosphate detergents. But there is no evidence in the record to prove that any phosphate substitutes used by the appellees in Chicago violate Milwaukee's ordinance."

Yet, in *Bibb,* adherence to the mud-flap regulations of different states was not legally forbidden, but rather occasioned serious "delay and inconvenience" (359 U.S. at 529); in *Southern Pacific* trains which satisfied Arizona's size limits could lawfully have operated in California and New Mexico, for those States did not require *minimum* train sizes; and it was sufficient in *National Bellas Hess* that States other than Illinois might subject business in a "virtual welter of complicated obligations" (386 U.S. 760).

Additionally, the court's reading of *Detroit,* that "potential" disparity in legislation may be disregarded in determining whether commerce is unconstitutionally burdened is inconsistent with prior decisions,[6] as well as the more recent *National Bellas Hess* case where, as in *Detroit,* Mr. Justice Stewart wrote for this Court.[7]

4. The only burden theory in which the court below found "some merit" (Pet. A-13) was that the Chicago ordinance has an extraterritorial effect because warehouses which service retail grocery chains in Chicago and its environs refused to stock both phosphate and non-phosphate detergents of the same manufacturer. This reduced Procter's sales and of course withdrew from potential purchasers outside Chicago a detergent formula that may legally be sold and bought there.[8] The

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[6] See *e.g., Southern Pacific Arizona, supra,* 325 U.S. at 775: ("If one state may regulate train lengths, so may all the others, and they need not prescribe the same maximum limitation"); *Freeman* v. *Hewit, supra,* 329 U.S. at 256: ("The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment.")

[7] "[I]f Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions. . . ." 386 U.S. at 759-760, emphasis added.

[8] The District Court found:

> "Modern-day detergents were developed and patented after World War II by chemists who discovered that phosphates when combined with other materials would clean better than soap, particularly in hard water. Detergents contributed to the development of the automatic washing machines and dish-

Court admitted that thereby "the free flow in commerce of a particular product is disrupted," which "must be deemed a burden on interstate commerce" (*id.*). The Court determined, however, that this burden is only "slight" (*id.* A-15), the critical conclusion under its "compromise", see *id.* A-9.

The major prop of the Court's discussion of the extraterritoriality problem is its elaborate speculation that warehousemen might ultimately choose to change their present practice and to undertake to distribute both phosphate and non-phosphate detergents of the same manufacturer (Pet. A-14-15). It is even suggested that petitioner Procter "and the other two large detergent manufacturers are huge companies that could exert at least some 'leverage' on these warehouses" (*id.* A-14). Even if these companies could lawfully exercise in this manner the economic power thus casually attributed to them (but cf. *Fortner Enterprises* v. *United States Steel Corp.*, 394 U.S. 495, 502-504), the

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washers, and the two complementary lines of products flourished. * * *

The evidence is clear that a detergent made with phosphate is a more effective cleaning agent than non-phosphate detergents when used with Chicago's water and is not at all harmful to the persons using it or wearing clothes or eating from utensils washed in it." (Pet. B-6)

The Court of Appeals did not disturb these findings.

The industry has spent large sums to develop non-phosphate substitutes which will match the cleaning efficiency of phosphates. The most promising substitute material is Nitrilotricetate (NTA) (see R. 825). It was stipulated that: "Use of NTA has been held up pursuant to the urging of the Surgeon General of the United States, pending further investigation of its safety. Recently a government commission has reiterated the request to withhold NTA from the market pending further investigation." (R. 197) At the present time the Department of Health, Education and Welfare is still studying NTA and has not given the industry clearance to use it.

ordinance would still make it impossible for those among their smaller competitors who can manage to produce both phosphate and non-phosphate detergents to market them in the Chicago area.[9] We need not pursue this point, however, for this Court long ago held, in a unanimous opinion by Mr. Justice Holmes, that the substantiality or insubstantiality of a burden on commerce does not depend on the actions of third persons over which the regulated party has no control:

> "These judgments must be taken as they read upon their face. They are not conditional orders to raise the bridge if the defendants can obtain the consent of parties not before the court, and of one authority, at least, not subject to its control. They cannot be qualified by speculation as to what is likely to happen in fact." *Kansas City Southern Railway Co.* v. *Kaw Valley Drainage District of Wyandotte County, Kansas*, 233 U.S. 75, 78.

Since the burden which the Chicago ordinance imposes on interstate commerce in detergents cannot be measured by wishing away the practices of the grocery warehouse industry, the Court's other endeavors to belittle the ordinance's extraterritorial impact can be dealt with summarily. Two of those arguments appear to be inconsistent with the Court's general approach to the burden issue. First, the Court relied on the circumstance that there are "[o]ther jurisdictions in the Chicago marketing zone [which] have

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[9] We do not regard it as mere happenstance that the Court's reasoning led it in a direction fraught with danger to competition in the market for detergents. While it is inappropriate to do so in a brief supporting a petition for certiorari, we propose to demonstrate, if we have the opportunity to present a brief on the merits, that local regulations restricting the sale of nationally marketed products have an inevitably adverse effect on competition far beyond the immediate locale of regulation.

limitations on phosphate detergents" (Pet. A-13); yet, the Court elsewhere said that uniformity of legislation is of lesser importance with respect to production and merchandising than with respect to transportation (*id.* A-11-12, see pp. 8-9, *supra*). Second, the Court pointed to "the possibility that manufacturers might be able to 'dropship' directly from the plant to stores in some areas [, although] this might not be the customary or most economical procedure * * *" (*id.* A-13-14). What now of the Court's assurance that "[t]here is no impairment of the ultimate ability to transport in interstate commerce in the most efficient and economical manner possible" (*id.* A-11)?

The Court also deemed it to be "important", albeit "not determinative", that the burden of extraterritoriality "is one that was not intended by the City Council" (Pet. A-13).[10] Whether and how much a law burdens interstate commerce is an objective fact "in the world of practical affairs" (*Freeman* v. *Hewit*, 329 U.S. at 256).[11] This Court should make clear that consideration of that issue is not to be confused by injecting the foreign element of subjective intent.[12]

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[10] This did not inhibit the City from attempting to support the ordinance in the Court of Appeals "on the basis of this extraterritorial coercion" (Pet. A-19, n. 23), an argument which the Court properly rejected (*id.*).

[11] In *Freeman* this Court struck down a tax imposed by a seller State because "potential taxation by consumer States" (*id.* at 257) created an unconstitutional burden on commerce. No inquiry was made whether the seller State intended that such multiple taxation would result; presumably the seller State was either indifferent to the consumer State's policy or, more likely, preferred that the consumer State impose no tax.

[12] For the sake of clarity we emphasize that the purpose of that law—that is, the local policy it is enacted to promote—may, of course, be considered in deciding whether that burden is unconstitutional, though it cannot be decisive, *e.g.*, *Minnesota* v. *Barber*, 136 U.S. 313, 319.

## CONCLUSION

The last decade has seen growing public concern over the environmental effects of the public consumption of otherwise wholly beneficial products, and legislative bodies at every state and local level have responded. It is symptomatic of the force of this movement, and might have bemused Carl Sandburg, that it is the great city of Chicago which has here endeavored "to encourage a pastoral instead of an industrial society." *Freeman* v. *Hewit, supra,* 329 U.S. at 252. But this development, though wholesome and overdue, is not without countervailing costs, and insofar as local environmental regulations affect nationally produced and marketed products, it inevitably jeopardizes the "material success that has come to inhabitants of the states which make up this federal free trade unit" and which "has been the most impressive in the history of commerce." *Hood* v. *DuMond, supra,* 336 U.S. at 538.

Of course, Congress has power to reconcile these tensions between the national economy and local or regional environmental interests. Unless and until Congress acts, however, it is, as it historically has been, the responsibility of the courts and most particularly this Court, to safeguard the values which the Commerce Clause was adopted to promote. Because of the increasing importance of the problem which this case typifies, state and local legislative bodies require guidance so that they may confine their environmental enactments within constitutional bounds. And the lower courts, too, need enlightenment in dealing with what was acknowledged below to be "a very difficult constitutional problem" (Pet. A.-20). The opinion below, though conscientious, does not provide a constitutionally tenable answer, because, as we have sought to show

herein, in elaboration of the Petition, it departed from this Court's precedents in evaluating the burden which the Chicago ordinance imposes on interstate commerce in detergents. Above all, we submit that only constitutional chaos can result if regulation and adjudication are to proceed from the assumption that the production and sale of goods in interstate commerce is less worthy of protection from interference than transportation (Pet. A-10; A-12)— a reading of the Commerce Clause which last prevailed here in *Carter* v. *Carter Coal Co.*, 298 U.S. 238.

For the reasons stated in the Petition and herein, the Petition for Certiorari should be granted.

Respectfully submitted,

ALAN S. WARD
Baker, Hostetler, Frost
& Towers
1425 H Street, N.W.
Washington, D.C. 20005

March, 1975

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In The

# Supreme Court of the United States

October Term, 1974

## No. 74-1109

**THE PROCTER AND GAMBLE COMPANY, and FMC CORPORATION,**

*Petitioners,*

vs.

**THE CITY OF CHICAGO,**

*Respondent.*

## BRIEF IN OPPOSITION OF RESPONDENT CITY OF CHICAGO

Respondent City of Chicago, a municipal corporation, respectfully urges the Court to deny issuance herein of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the petition for certiorari.

## QUESTIONS PRESENTED

1. Whether the Chicago ordinance, banning the sale of detergents containing phosphorus as harmful to the environment, is a reasonable exercise of the City's police power within the legislative discretion of the City Council.

2. Whether federal environmental control has preempted the field of environmental control, to the exclusion of supplementary State and local environmental regulation.

3. Whether the Chicago ordinance unduly burdens interstate commerce in violation of Article I, Section 8, Clause 3, of the Constitution of the United States.

4. Whether the petitioners have proven they were damaged.

## REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals is based upon well established constitutional principles which have been reiterated by this Court time and time again over many decades. It presents no novelties or uncertainties that require the intervention of this Court.

Petitioners' conception of the "free circulation" of commodities in a national economy exempt from State and local governmental exercises of the police power, which the petition for certiorari (p. 10) describes as mere "local impediments," is profoundly erroneous. If petitioners' theory of the commerce clause were law, which it is not and never has been, it would compel a universal federal preemption of all regulation of every phase of interstate commerce.

The field of environmental control, in particular, has not been preempted by the federal government. On the contrary, the federal environmental control statutes expressly recognize the right of State and local governments to enact supplementary State and local environmental control legislation. The petition totally ignores this, although the opinion of the Court of Appeals specifically mentioned it (Petition, A. 16). Petitioner's conception of the Commerce Clause would nullify this direction of the Congress.

The petition describes as true, not merely what is in controversy, but what was admitted as untrue by petitioner Procter and Gamble Company at the public hearing before the Environmental Control Committee of the City Council at the time the ordinance was enacted. The petition (p. 10) describes phosphate detergents as "safe and beneficial

products," whereas petitioner there admitted (A. 2138, 2147) that phosphates in detergents are "guilty" of having a deleterious effect on the environment, to find a safe and effective substitute for which the company was spending millions of dollars on research.

Nor does the petition describe the opinion of the Court of Appeals accurately. It did not limit the Commerce Clause to interstate transportation. And although the opinion modestly described the constitutional questions presented as difficult, it experienced no hesitancy or uncertainty in coping with them.

## I.

**ENVIRONMENTAL CONTROL HAS NOT BEEN PREEMPTED BY THE FEDERAL GOVERNMENT.**

**IN THE ABSENCE OF PREEMPTION, THE COMMERCE CLAUSE DOES NOT PROHIBIT LOCAL LEGISLATION, ENACTED PURSUANT TO A MUNICIPALITY'S POLICE POWER, DESIGNED TO PROTECT AND IMPROVE THE ENVIRONMENT, EVEN THOUGH IT AFFECTS INTERSTATE COMMERCE.**

There is nothing in federal law which precludes involvement of local governments in environmental control. On the contrary, Section 1370 of the Federal Water Pollution Prevention and Control statute (33 U.S.C. §1370), as the Court of Appeals noted (A. 16), declares:

> "Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollution, or (B) any requirement respecting control or abatement of pollution; . . . ."

The federal Clean Air Act contain similar provisions recognizing the power of State and local governments to enact and enforce measures for the prevention and control of air pollution (42 U.S.C. §1857d-1).

It is well established that, in the absence of preempting federal legislation, the commerce clause does not prohibit state or local legislation, enacted pursuant to the police power of the State or municipality, for the evident purpose of protecting the health, safety or welfare of the community, even though such legislation may have some effect on interstate commerce. *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. ed. 412 (1829); *License Cases*, 5 How. 504, 12 L. ed. 256 (1847); *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U.S. 177 (1939); *Milk Board* v. *Eisenberg*, 306 U.S. 346 (1939); *California* v. *Thompson*, 313 U.S. 109 (1941); *H.P. Hood & Sons* v. *DuMond*, 336 U.S. 525 (1949); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960); *Brotherhood of Locomotive Firemen* v. *Chicago, R.I. & P.R. Co.*, 393 U.S. 129 (1968).

The Chicago ordinance does not discriminate against out-of-state producers or distributors or in favor of their local competitors. Indeed, before the effective date of the Chicago ban on phosphates in detergents, petitioner Procter and Gamble Company manufactured practically all the detergents it needed for the Chicago warehouse marketing area at its plant within the city limits of Chicago. The gist of its complaint is that, as a result of the ban, it had to ship detergents into the city which it had produced in several other of its plants outside the State.

While this Court has consistently rebuffed attempts of States to advance their own commercial interests by curtailing interstate movement of articles of commerce, the

Court has also consistently supported the rights of the States and their local governmental units to impose, in the interest of local health, safety and welfare, even burdensome regulations against dangers emanating from interstate commerce. *H.P. Hood & Sons* v. *DuMond,* 336 U.S. 525, at 533, 535 (1949).

This principle was held applicable to a municipal anti-pollution ordinance in *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960). It has also been invoked to justify state and local legislation aimed at conserving natural resources. Thus, in *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.,* 340 U.S. 179 (1950), this Court upheld the validity under the Commerce Clause of an Oklahoma statute regulating the production of natural gas as a legitimate measure to prevent waste of the State's natural resources "even though the regulation has some impact on interstate commerce" (at 186). There is no natural resource more important than water. Legislation directed toward protecting the quality of the water of a municipality is aimed at conserving its natural resources.

As Justice Frankfurter declared in *Freeman* v. *Hewit,* 329 U.S. 248, at 253 (1964)—a case cited seven times in the amicus curiae brief of the Soap and Detergent Association (pp. 2, 3, 7, 9, 11, 14, 15):

> "A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State. *Minnesota Rate Cases* (*Simpson* v. *Shepard*), 230 U.S. 352, 402 et seq.; *South Carolina State Highway Dept.* v. *Barnwell Bros.,* 303 U.S. 177; *Union Brokerage Co.* v. *Jensen,* 322 U.S. 202, 209-212."

## II.

**THE CHICAGO ORDINANCE BANNING PHOSPHATES IN DETERGENTS IS A VALID AND CONSTITUTIONAL EXERCISE OF LEGISLATIVE DISCRETION PURSUANT TO THE POLICE POWER.**

The Chicago ordinance banning phosphorus in detergents and the decision of the Seventh Circuit upholding its validity can both be sustained on the authority of *Brotherhood of Locomotive Firemen* v. *Chicago, Rock Island and Pacific R. Co.,* 393 U.S. 129 (1968). It was, in fact, under the precedental aegis of the *Brotherhood* case that petitioner Procter and Gamble and several other detergent manufacturers were in *Soap and Detergent Association et al.* v. *Clark,* 330 F. Supp. 1218 (S.D. Fla., 1971) denied a preliminary injunction against enforcement of a Dade County, Florida, ordinance also banning phosphorus in detergents.

*Brotherhood* reversed a district court decision invalidating a state "full-crew" railroad law. This Court ruled that, in determining whether such enactments impose a burden on interstate commerce prohibited by the Constitution, the district court was not authorized to resolve conflicts in the evidence as to the necessity of the laws as safety measures. In thus reaffirming its prior decisions upholding "full-crew" legislation by the states—*Chicago, R.I. & Pa. R. Co.* v. *Arkansas,* 219 U.S. 455 (1911), *St. L., L.M. & S.R. Co.* v. *Arkansas,* 240 U.S. 518 (1916), *Missouri Pac. R. Co.* v. *Norwood,* 283 U.S. 249 (1931), 290 U.S. 600 (1973)—this Court declared that safety is a matter of public policy, which under the American system can be fixed only by the legislature. The Court held that it was not open to the district court to place a valve on the additional safety in terms of dollars and cents, in order to

determine whether this valve, as calculated by the trial court, exceeded the financial cost to the railroads. In the absence of Congressional action, the judicial power of the federal courts cannot be invoked to invalidate a state safety statute, expressing the judgment of the people of the state through their elected representatives as to the price that should be paid for safety in the industry.

Similarly, in *South Carolina Highway Department* v. *Barnwell Brothers,* 303 U.S. 177 (1938), in upholding a state statute which prohibited trucks over a certain weight from using the state highways, this Court disallowed the trial court's inquiry into the effect of the weight of vehicles upon road durability and traffic safety. The Court declared (at 182-4) that "fairly debatable questions as to [a statute's] reasonableness, wisdom and propriety are not for the determination of the courts, but for the legislative body."

**a. The Legislative Deliberations Were Based On Thorough Documentation And Unbiased Public Hearings.**

The long and technical record in this case (A. 1-2787) makes it abundantly clear that the Chicago City Council, in enacting the ordinance, exercised its legislative discretion reasonably, non-arbitrarily and non-capriciously.

**i. The Origin of the Ordinance.**

In February, 1970, Alderman Michael A. Bilandic, the chairman of the Environmental Control Committee of the City Council, received a communication from the Metropolitan Sanitary District of Greater Chicago, which set forth a resolution adopted by its Board of Trustees (A. 2688, 2689), expressing urgent concern about the phosphate problem. It stated that pollution of Lake Michigan

and "our waterways" was increasing at an alarming rate, that stagnation of these waters was being accelerated by phosphorus causing the growth of algae and other aquatic plant life, which reduce the oxygen level of waters. The resolution estimated that phosphates are a basic ingredient of 90 percent of all detergents, but that non-polluting substitutes for the phosphates can readily be obtained. Detergents with phosphates cause untold problems in water treatment and increase the operating costs of sewage treatment plants. The Sanitary District calculated that a nationwide ban on phosphates in detergents would result in an annual savings of $478,000,000 in operating costs of sewage treatment plants in the United States.

Alderman Bilandic was also impressed with the fact that in the Chicago area, the Metropolitan Sanitary District was spending $20,000,000 of the taxpayers' money each year in a for the most part unsuccessful attempt to remove the phosphorus introduced by detergents. Since he suspected the phosphorus probably did not have to be put into the sewage in the first place, he felt the possibility should be explored as to whether the substance could be dispensed with (A. 1043).

In response to the resolution of the Sanitary District, Mayor Daley ordered a thorough staff study of the problem, including a review of the technical literature, and requested the Environmental Control Committee of the City Council to conduct public hearings.

### ii. The Report of the International Joint Committee.

Among the materials considered by the committee were several official reports, published by the United States government and made by the U.S. Council on Environ-

mental Quality, the Reuss committee investigating phosphate detergents for the U.S. House of Representatives and the International Joint Commission of Canada and the United States. These reports summarized the experience and expert opinions of the leading chemists and sanitary engineers in the field. They were based on public hearings in which industry defenders of phosphate detergents participated and presented their case. These official reports, which were also introduced into evidence in this lawsuit and have been reproduced in the Appendix (A. 2326-2664), declare in no uncertain terms that the use of phosphorus in detergents seriously deteriorates the environment and is a formidable pollutant.

The report of the International Joint Commission had been the result of a 1964 request by the respective governments to conduct an intensive inquiry into the increased pollution that had led to the dramatic deterioration of Lake Erie.

The Report of the International Joint Commission found (A. 2356, 2357):

> "Increased population, industrialization, intensified agricultural practices and the use of phosphorus-based detergents since the late 1940s have greatly increased the rate of eutrophication of lakes in many parts of the world, including Lake Erie and Lake Ontario. Dense nuisance growths of algae and aquatic weeds degrade water quality. Cladophora, an attached alga, piles up on the beaches when dissolved by wave action. Blue green algae accumulate on the shore creating unsightly odorous scums."

The meaning of the term "eutrophication" was set forth in the Report in the following terms (A. 2355, 2356):

"Eutrophication is the biological response caused by an increase of nutrients in lakes. The biological productivity depends on the supply of essential nutrients. . .

". . . Eutrophic lakes are rich in plant nutrients and support a heavy growth of aquatic vegetation. As a result, biological production is high; the waters are turbid due to the dense growth of phytoplankton; and the deeper waters during periods of restricted circulation become deficient in oxygen as a result of the decomposition of great quantities of organic material. . . .

". . . The biological response produced by natural eutrophication is extremely slow. On the other hand, the inputs of man-derived nutrients into a lake can produce in a few decades a biological response similar to that which under natural conditions would take tens of thousands of years."

Of the various sources of this artificially accelerated eutrophication of the lakes, the Report found (A. 2393, 2394) that phosphorus is the only one that is both growth-limiting in the lakes and can be controlled effectively by man with present-day technology. It also stated that the major source of phosphorus in the lakes is municipal sewage, that in the United States portion of the lakes basin, 70 percent of the phosphorus in sewage originates from detergents, most of the remainder from human excreta, other significant sources being agricultural runoff and some industrial wastes.

In conclusion, the Commission recommended the "complete replacement of all phosphorus in detergents with environmentally less harmful materials by December 31, 1972" (A. 2443).

### iii. U.S. Government Reports on Phosphate Detergents.

The Reuss Report concentrated on the detergent industry's defense of the case against phosphorus in detergents, such as the contentions (a) that phosphorus in detergents had not been proven to be the cause of eutrophication; (b) that, when the level of phosphorus in water reaches a certain point, further additions of phosphorus will not result in increased eutrophication; (c) that there is already so much phosphorus in surface waters that eliminating all phosphorus in detergents would not retard the rate of eutrophication; and (d) that phosphate detergents are necessary to maintain cleanliness and sanitation standards. All these objections to banning phosphates in detergents are considered in detail and rejected by the Reuss Report on the basis of contrary evidence.

The First Annual Report of the U.S. Council on Environmental Quality (A. 2607-2664) also found phosphorus in detergents a major cause of water pollution.

### iv. Commissioner of Environmental Control Poston.

The ordinance was enacted with the strong endorsement of Dr. H. Wallace Poston, the Commissioner of Environmental Control of the City of Chicago. He testified both before the City Council committee (A. 1992-2033, 2292-2300) and at the trial herein (A. 1138-1213). A graduate sanitary and civil engineer since 1932, Dr. Poston had spent the whole of his long career on environmental matters. From 1949 to 1970 he had been with various federal agencies, including the U.S. Public Health Service and the Federal Environmental Protection Agency. Since 1956 he had been on the Advisory Board on Water Pollution Control of the International Joint Commission. In 1969

Dr. Poston became the U.S. Co-Chairman of the International Joint Commission.

As a result of this extensive technical experience, Poston formed the opinion that phosphates in detergents are contributing to the degradation of our waters and should be eliminated. He was concerned about the large amounts of phosphorus in the Illinois River, from which downstream communities, such as Peoria, receive a large part of their water supply. Even where phosphorus is not the limiting nutrient, elimination of phosphorus brings nearer the day when the water in the river will be clean and it lessens the distance the phosphorus is felt downstream. Poston testified that 60 percent of the phosphorus that goes into the Illinois Waterway from the Metropolitan Sanitary District comes from detergents.

Dr. Poston was also concerned about the amount of phosphorus in Lake Michigan (A. 1155). He testified, "Phosphates that are emptied into Lake Michigan are hazardous to our water supply" (A. 1158) and "Algae is the worst problem insofar as taste and odor in the water supply is concerned" (A. 1173). The ordinance banning phosphorus in detergents does have an effect on other communities around Lake Michigan (A. 1208), since, as the plaintiffs emphasize, practically all the communities around Chicago, as shown on petitioners' map of the Chicago Marketing or Warehouse Area (reproduced at A. 183), get their detergents from the Chicago grocery warehouses. Furthermore, inland communities in the Chicago Warehouse Area, such as Elgin, discharge their sewage into tributaries of the Illinois River, such as the Fox River and Desplaines River, which have great quantities of nuisance algae.

Dr. Poston concluded his testimony at the trial by declaring that the Chicago ordinance was intended to set the communities around Chicago and even around the nation a practical example of a cleanup of the waterways (A. 1208).

### v. The Experience of the City's Expert on Water Purification.

Since the 1940's, James C. Vaughn, the now retired Engineer of Water Purification of the City of Chicago (A. 1953), had been warning of the dangers of the use of phosphorus in detergents (A. 1042, 1043, 1953, 1976). A graduate chemist, he had devoted all of his long career to water purification and he possesses an intimate scientific knowledge of the water quality of Lake Michigan over a period of 37 years (A. 1955). Vaughn also testified both at the City Council hearings (A. 2282-2292) and in a deposition taken in the instant lawsuit (A. 1951-1990).

Phosphorus is a contaminant in Lake Michigan, Vaughn stated (A. 1969). It is such by virtue of the conditions it participates in creating (A. 1970), in that it is a nutrient essential to the growth of algae, which in turn produce some serious water treatment problems (A. 1957). Algae accumulate on the screens of filtration plants (A. 1970, 2776, 2777), making it difficult at times to get enough water through the filtration plant to meet public demand (A. 1972). Periodically this creates taste and odor problems —giving "a plain, nasty fishy odor to the water" (A. 1970) or "a pigsty-tasting odor" (A. 1984). It takes a lot of chlorine and carbon to get this out, creates disposal problems and adds to the cost of water treatment in Chicago (A. 1984, 2776, 2777).

There is considerable sewage flowing into the southern end of Lake Michigan, Vaughn explained (A. 1959, 1960). This does not come from the City of Chicago or the suburbs in Cook County, Illinois, which dispose of their sewage through the facilities of the Metropolitan Sanitary District—except when during heavy rainstorms that system is reversed to flow into Lake Michigan instead of into the Illinois River (A. 1960-1963). But all four of the sewage plants of the North Shore Sanitary District in Lake County, Illinois, discharge their sewage into the lake. The sewage treatment of some of these plants removes no more than 40% of the solids and bacterial load (A. 1959). The Milwaukee sewage plant, serving some 600,000 people, discharges its sewage effluent into the lake; "that includes a good deal of untreated sewage," Vaughn testified (A. 1960). The three sewage plants in Lake County, Indiana, serving Gary, East Chicago and Hammond, with a total population of 560,000, discharge 90% of their sewage into Lake Michigan (A. 1959). The Grand and St. Joe Rivers in Michigan also discharge large quantities of sewage into the lake.

As for the future of Lake Michigan, Vaughn gave it as his opinion that if the input of phosphorus into the lake "stopped entirely . . . we would expect the phosphate content to remain more or less constant" because the phosphates absorbed into the life cycle of the plankton are not lost when a given body of plankton die and rot; they return to another life cycle (A. 1968). In recent years there has been a steady increase in the phosphate content of the lake (A. 1965). In the opinion of limnologists, it will take 200 years for Lake Michigan to recycle itself (A. 1969). And in the opinion of some experts, Vaughn testified (A. 1971), "if the phosphorus content" of Lake Michigan "continues

to increase at the present rate . . . Lake Michigan [can] be expected to have the consistency of pea soup by the year 2000."

In the opinion of the City's expert on water treatment, the best method of controlling the phosphates in Lake Michigan is "Not put them in" (A. 1972).

### vi. The Hearings Before the City Council Committee on Environmental Control.

The public hearings before the Committee on Environmental Control of the Chicago City Council were held on August 17 and 18, 1970, at which time witnesses were heard and questioned by members of the committee. There was also a concluding session on September 10, 1970, at which the text of the proposed ordinance was read, final statements were made for and against the proposal, and a motion to recommend that the ordinance do pass was adopted unanimously.

A transcript of the hearings appears at A. 1991-2323.

The witnesses testifying in favor of the proposed ban on phosphorus in detergents included several city officials, the Deputy Commissioner of Pollution Control for Cook County, Illinois, the Acting Superintendent and a Trustee of the Metropolitan Sanitary District, a professor of biology and representatives of several environmental organizations.

Testifying against the proposed ordinance were representatives of the Soap and Detergent Association (A. 2116-2147, 2153-2156), and of several manufacturers of detergents, including petitioner Procter and Gamble Company (A. 2147-2151).

In rebuttal of that testimony, several representatives of manufacturers and distributors of no-phosphate detergents were heard, including Sears, Roebuck and Company (A. 2170-2177, 2180-2243).

The Acting Superintendent of the Metropolitan Sanitary District, Ben Sosewitz, testified at the hearing (A. 2033-2049) and endorsed the proposed ordinance. He explained that conventional secondary sewage treatment does not effectively remove phosphorus. This can be done only by additional treatment with chemicals, resulting in precipitation of the phosphorus by iron, calcium and aluminum compounds (A. 2034, 2035). The additional cost to the Metropolitan Sanitary District of the alum treatment to achieve 80 to 90 percent phosphate removal would be about $20,000,000 per year (A. 2035). This additional treatment also creates solid sludge disposal problems (A. 2035).

Detergent sources probably account for 70 percent of the phosphorus in the wastes coming to the sewage treatment plant (A. 2035, 2036). The phosphorus level in the Sanitary District's influent had increased from 6 mg/1 p. to 10 mg/1 p. since 1960 (A. 2036).

In the history of sewage treatment, Sosewitz explained (A. 2041), it has been found more economical to intercept waste material at the source rather than wait until dilution takes place when all the wastes are mixed (A. 2041).

### vii. Testimony of Representatives of the Detergent Industry.

The detergent industry responded in force to the invitation to appear at the hearings.

The spokesman for the Soap and Detergent Association was Charles G. Bueltman, its vice-president and technical director. He is a sanitary engineer who for three years had been chairman of the Joint Government and Industry Task Force on Eutrophication. He declared quite frankly, "We take the position that phosphates, as a nutrient, are involved in eutrophication. We have never denied this" (A. 2138). He stated that "the detergent industry has reaffirmed its commitment to maintain highest priority in seeking phosphate replacements" (A. 2121). He said that Procter and Gamble had spent some $3,000,000 in 1969 on research for a replacement for phosphate in detergents and planned to spend $3,500,000 in 1970 for the same purpose (A. 2147, 2148).

Bueltman insisted that, despite all these efforts, no satisfactory substitute had been found, one both safe and efficient. Nitriloacetate (NTA) has been used to some extent, but it is in short supply. The detergent industry uses 2,000,000,000 lbs. of phosphate a year, and production of NTA amounts to only 100,000,000 lbs. a year. There is also a possibility that NTA presents health hazards. And there can be no return to reliance on soap because the required oils and fats are also in short supply.

At the time phosphate detergents were introduced in 1945, the industry had investigated phosphates from a product toxicity, health hazard point of view and found them safe in that respect. Few people were concerned at that time with environmental impact (A. 2143, 2144). Phosphorus did not emerge as an ecological issue until 1958. Since then, he said, the industry has been working on the phosphate problem for a decade. Bueltman frankly admitted (A. 2149, 2142):

> "There is no agreement within the Association as to what to do with our products . . .
>
> "I hope we have not given the impression that we consider phosphate no problem."

Procter and Gamble's representative at the hearings, William Krumrei, its director of public relations, concurred, saying (A. 2147):

> "We are not taking the position that phosphates aren't guilty and therefore, we are going to sit and wait.
>
> "Our policy, within our company, and I believe this is shared with the other companies, is that *if there is any possibility that phosphates are guilty, and there seems to be no question about that,* that we are going to move as quickly as we can to correct that situation. . . ." (Emphasis supplied.)

Lever Brothers' representative, Dr. Mel Goldberg, its technical services manager, supported the position of the Soap and Detergent Association, but admitted that Lever Brothers of Canada had complied with the Canadian limitation on phosphorus in detergents by the use of NTA and had converted its heavy-duty detergent, All, to a zero-phosphorus formula (A. 2159).

Those industry representatives pleaded for more time to find replacements for phosphates and asked the City Council to defer action. But other industry representatives assured the Council there was no reason for delay, that effective, but environmentally safe no-phosphate detergents were available and on the market. That was the position of Sears, Roebuck and Company, De Soto Chemical Company, Clearwater Products, Best Line Products and Diversey Chemical Company (A. 2170-2176, 2180-2231).

Sears assured the committee at the hearing that within two months it would be selling a no-phosphate detergent that contained no NTA and no harmful ingredients (A. 2170). De Soto said it had three plants in operation manufacturing no-phosphate detergents and was building a fourth. Its representative stated its no-phosphate detergent could be used in heavy duty laundry equipment and was less corrosive than phosphates (A. 2173, 2174). Clearwater's representative testified that it could supply Chicago with 90,000,000 lbs. per year of Chicago's detergent requirements of 200,000,000 lbs. per year, furnishing a phosphorus-free detergent that contained no NTA (A. 2209).

**viii. The Morris Photographs of the Illinois River.**

While the proposed ordinance was pending before the City Council committee, Commissioner Poston dispatched his Deputy Commissioner of Environmental Control, John G. Morris, on a reconnaissance flight to check on the current state of algae growths in the Illinois River (A. 1243, 1244). A graduate civil and sanitary engineer with at that time 22 years professional experience, Morris had in 1961-62, as Director of Technical Operations of the U.S. Public Health Service in the Great Lakes-Illinois River Project, supervised the compilation of a detailed technical report (Defendant's Exhibits 38, 39) on the entire Illinois River drainage basin for the hearings on diversions from Lake Michigan conducted by Judge Maris, sitting as master-in-chancery for this Court (A. 1222, 1223).

Accompanying Morris on his helicopter survey was a commercial photographer, who, at Morris' direction, took numerous photographs of algae blooms and other evidences of accelerated eutrophication in the Illinois River. These

pictures were available to members of the committee during its deliberations.

29 of these photographs, developed as slides, were introduced in evidence at the trial of this case as Defendant's Exhibits 44, 44A-2 and 44AA-44CC, inclusive. They were projected on a screen in the courtroom and accompanied by Morris' running commentary (A. 1243-1247, 1250-1256). These photographs are reproduced at A. 2713-2742.

The reconnaissance was conducted over the Illinois River from Lockport to just below the Starved Rock Pool (A. 1244). Morris explained that the Illinois River is a navigable waterway that has been developed through the construction of a series of dams on the river, with the result that there is "a complete sequence of pools from the confluence of the Illinois River [with] the Mississippi up and through the Chicago River to locks going into Lake Michigan." Because of these constructions and impoundments along its length, the Illinois River cannot be characterized as a free-flowing stream (A. 1226).

The photographs show heavy growths of filamentous algae, large mats of cladophora and noxious aquatic plants, such as coon tail, which clog filters and water intakes and interfere with recreational use (A. 1253). Parts of the river were of the pea soup color associated with dense blooms of blue green algae (A. 1254).

### ix. Enactment of the Ordinance.

On September 10, 1970, on the basis of the record before it, the City Council's Committee on Environmental Control unanimously recommended that the proposed ordinance do pass (A. 2324).

On October 14, 1970, the City Council adopted the ordinance by a unanimous vote. An 8.7% limitation on phosphorus in detergents became effective February 1, 1971. The total ban became effective July 1, 1972.

**x. The Effectiveness of the Ordinance.**

The Director of Research and Development of the Metropolitan Sanitary District of Greater Chicago, Dr. Cecil Lue-Hing, testified at the trial that, as of January, 1973, the phosphate content of the effluent of the Sanitary District had been reduced 67.6 percent as a result of the ordinance (A. 1425-1431). Thus, the effect of the ordinance, he explained, is to bring the Sanitary District into compliance with the standard proposed by the Illinois Pollution Control Board for phosphorus discharges in man-made waterways. The proposed standard is 1.0 part per million. Since the ordinance went into effect, the phosphorus concentration at the Sanitary District's West-Southwest plant, the largest sewage treatment plant in the world, from August to December, 1972, ranged between 0.7 and 0.4 parts per million.

The efficiency of sewage treatment at the Sanitary District has also been improved as a result of the ordinance. A sewage treatment plant's efficiency is measured in terms of suspended solids and biochemical oxygen demand (BOD). Dr. Lue-Hing produced detailed official Sanitary District statistics on these items, illustrating them with graphs. At the West-Southwest plant, suspended solids had been reduced 154,383 lbs. per day; at the North Side plant, the reduction amounted to 26,420 lbs. per day. The total reduction of BOD was 24,688 tons per year.

## III.

**THE COURT OF APPEALS WAS CORRECT IN RECOGNIZING THE PRESUMPTION OF VALIDITY ATTACHING TO THE ORDINANCE AS DULY ENACTED LEGISLATION.**

Petitioners assail the court of appeals with a quite amazing accusation. They claim (Petition, p. 14) that the Seventh Circuit in recognizing (Petition, A-9, 10) the presumption of constitutionality attaching to duly enacted legislation, has "fashioned a novel 'presumption', unsupported by the decisions of this Court, to determine the constitutionality of the Chicago ordinance."

On the contrary, this Court has repeatedly held that the function of the United States courts in reviewing the constitutionality of a state statute or municipal ordinance is limited. As this Court declared in *James* v. *Strange*, 407 U.S. 128, at 133 (1972):

> "We turn therefore to the Kansas statute, aware that our reviewing function is a limited one. We do not inquire whether this statute is wise or desireable, or 'whether it is based on assumptions scientifically substantiated'. *Roth* v. *United States*, 354 U.S. 476, 501 . . . (1957) . . . Misguided laws may none the less be constitutional. . . Our task, however, is not to weigh this statute's effectiveness, but its constitutionality."

Indeed, it is not decisive whether or not the legislative body actually considered the grounds on which the court sustains the enactment, so long as its constitutionality can be justified by some mode of reasoning. *Flemming* v. *Nestor*, 363 U.S. 603, at 612 (1960).

Even if the wisdom of the policy be regarded as debatable, still the legislature is entitled to its judgment. *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, at 397,

398 (1937) (Hughes, C.J.); *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States* v. *Darby*, 312 U.S. 100, at 115 (1944); *Sonzinsky* v. *United States*, 300 U.S. 506 (1937); *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Olson* v. *Nebraska*, 313 U.S. 236 (1941); *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421 (1952).

Under the system of government created by the Constitution, it is up to the legislatures, not the courts, to decide on the wisdom and utility of legislation. *Ferguson* v. *Skrupa*, 372 U.S. 725, at 729, 730 (1963); *Hebe Company* v. *Shaw*, 248 U.S. 297, at 302 (1919) (Holmes, J.).

This presumption that a legislative enactment is constitutional, as stated in many precedents, can be overcome only by "clear and convincing evidence." As the Court of Appeals for the Sixth Circuit declared in *Tower Realty, Inc.* v. *City of East Detroit*, 196 F. 2d 710, at 718 (1952):

> "With regard to the presumption of constitutionality, the rule applicable to ordinances of a city government is the same as that applied to statutes passed by the legislature. . . A statute or ordinance will be presumed to be constitutional by the courts unless the contrary clearly appears; and in case of doubt, every possible presumption not clearly inconsistent with the language and the subject matter is to be made in favor of the constitutionality of the legislation."

Different standards for the evaluation of evidence required to meet the burden of persuasion have been devised for different types of action. The degree of stringency required may be by "a preponderance of the evidence," or by "clear and convincing evidence," or by proof "beyond a reasonable doubt," depending on the nature of the action. Proof by "clear and convincing evidence" is more exacting

than proof by a mere preponderance of evidence. The higher standard of proof means that the trier of the facts must be convinced that the truth of the contention is not merely more probable than not, but is highly probable or a moral certainty. *McCormick on Evidence* (Cleary ed., 1972), p. 796.

The burden of proof never shifts, but at all times remains on the party with the burden of persuasion to sustain the claim on the merits of the case. 9 *Wigmore on Evidence* (3d ed., 1940) §2489; Ladd and Carlson, *Cases and Materials on Evidence* (1972), p. 1186. The burden of going forward with the evidence is different from and distinguished from the burden of proof. It means no more than the obligation of a party to produce contradicting evidence when evidence has been presented by an opponent. Understanding and maintaining the distinction between "burden of proof" and "burden of going forward with the evidence" is vital to the trial of a case (*Id.*).

It was in the light of the foregoing well established principles that the court of appeals ruled: (Petition, A-9, 10):

> "It was proper, however, for the court to consider the 'factual' question of whether the ordinance has any relationship to the elimination of nuisance algae. The question that we are faced with is how much weight, if any, should be accorded the legislature body's determination that the means are reasonably related to achieving the end. In the present case we think it is at this point that the *Pike* balancing occurs. The district court addressed this issue as if it was an ordinary factual dispute over a technical matter that should be decided without the benefit of a presumption. It is our view, however, that if the burden on interstate commerce is slight, and the area of legislation is one that is properly of local concern, the means chosen

> to accomplish this end should be deemed reasonably effective unless the party attacking the legislation demonstrates the contrary by clear and convincing proof. If it is determined that this presumption should be applied, no further balancing need be undertaken. The end has already been deemed legitimate and the burden on interstate commerce slight. If the legislation is a reasonable means to that end it is constitutional."

The citation (Petition, p. 15) of *Minnesota* v. *Barber*, 136 U.S. 313, (1890), as authority for the proposition that "a presumption that local legislation has been validly enacted can [not] be permitted to control the applicability of the Commerce Clause to that legislation," is inapposite. That case concerned a state statute requiring the preslaughtering inspection of livestock destined for human consumption. The Court determined that the statute, despite its stated purpose, had the *de facto* effect of discriminating against out-of-state packers. In the case at bar there is not the slightest element of any such discriminatory effect in the Chicago ordinance. But it was in the context of the Minnesota statute being a *de facto* embargo against interstate commerce that this Court said (at 319), "The presumption that this statute was enacted in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States." Nowhere in the record have the petitioners contended that the Chicago ordinance was not enacted in good faith.

## IV.

**THE AUTHORITIES CITED BY PETITIONERS ARE NOT APPLICABLE. EVEN IF THEY WERE APPLICABLE, THEY WOULD NOT SUPPORT PETITIONERS' CLAIM.**

The Seventh Circuit did not base the decision in the instant matter entirely on the doctrine of the *Brotherhood* case, as it would have been justified in doing. It also followed the line of cases cited by petitioners that appear to require that the court, in order to determine the ultimate question of constitutionality, balance the burden on interstate commerce against the local benefit resulting from the enactment—that is, *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945), *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), and *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1940).

*Southern Pacific* and *Bibb* involved state regulation of interstate commerce, in matters (train length and mudguards on trucks) in which interstate uniformity is the compelling interest. See *Soap and Detergent Association* v. *Offutt*, 3 ERC 1117, 1119 (S.D., Ind. 1971), which held these authorities inapplicable to environmental legislation regulating the composition of detergents. *Pike* had in it an element of discrimination against out-of-state enterprises and concerned a statute aimed at promoting the good reputation of local cantaloupe growers, a non-police power state interest adjudged of minimal importance by this Court. But even though that line of cases is not, strictly speaking, applicable here, the court of appeals, in an excess of caution, took it into its comprehensive consideration in deciding this case (Petition, pp. A-7-A-9).

The principal non-transportation case upon which the petitioners rely (Petition, pp. 15, 16) is *Pike* v. *Bruce*

*Church, Inc.*, 397 U.S. 137 (1970). They maintain that this "established" the requirement that applications of the Commerce Clause entail a resolution of questions of "degree". But in *Pike* this Court clearly stated (at 143, 146):

> "We are not, then, dealing here with 'state legislation in the field of safety where the propriety of local regulation has long been recognized' or with an Act designed to protect consumers in Arizona from contaminated or unfit goods. Its purpose and design are simply to protect and enhance the reputation of growers within the State.
>
> ". . . [H]ere the State's interest is minimal at best."

It will be recalled that *Pike* concerned an Arizona statute which prohibited the shipment of cantaloupes out of Arizona unless they were packed in containers in a manner approved by the state. Evidently cantaloupes could be so packed in large numbers only in packing sheds. Plaintiffs' packing shed was located in California, 31 miles away. To build such a packing shed in Arizona would have entailed an expenditure by the plaintiff of $200,000 and meanwhile its perishable $700,000 cantaloupe crop in Arizona would have been lost. Thus, in *Pike*, there was also a strong element of discrimination against an out-of-state enterprise. It was in that context that this Court said in *Pike* (at 142):

> "Although the criteria for determining the validity of state statutes affecting interstate commerce has been variously stated, the general rule that emerges can be phrased as follows: where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Portland Cement*

> *Co.* v. *Detroit,* 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens."

By its own terms *Pike* is inapplicable to state enactments in the field of safety or legislation designed to protect consumers from unfit goods—that is, police power measures. Legislation that protects the waters of the whole community is a safety measure. Legislation that protects consumers from consuming goods unfit to be consumed because of their deleterious effect on the environment is not, we submit, subject to a balancing test. Such legislation must be upheld if it is a reasonable exercise of legislative discretion.

However, the court of appeals did apply the *Pike* balancing procedure to the Chicago ordinance in minute detail (Petition, pp. A9-20). It came to the conclusion that the burden on interstate commerce was slight compared to the important and proper local objective (p. A-17) and the ordinance "sufficiently effective to be declared constitutional" (p. A-20).

The petitioners have failed to address themselves to a criticism of the court of appeals' detailed application of the balancing test. Instead, the petitioners content themselves with an indulgence in inaccurate generalities.

Petitioners (p. 15) attempt to buttress their position with the authority of Professor Paul Freund. But it is

the court of appeals in its opinion, and not the petitioners, that has applied Freund's analysis of this Court's method of interpreting the Commerce Clause. See Freund, The Supreme Court of the United States (Meridian ed. 1961), p. 21), where he comments:

> "The Court has long since abandoned the merely verbal criteria and has sought, on a highly particularistic basis, to weigh the local benefit and need against the burden on commerce with other states. In the silence of Congress a state may enforce a full-crew law against an interstate railroad; but it may not apply a maximum-train-length statute to such a carrier. The difference can be found only in an estimate, based on a detailed record, of the balance in each case between local safety and the burdensome effects of compliance."

With the utmost patience Chief Judge Swygert has made a highly particularistic estimate, based on the long and detailed record in this case, of the balance between the local objectives and benefits of the Chicago ordinance and its effects on interstate commerce.

He began his analysis by noting (A. 6, 7) that the task involved several questions: 1) we must first decide whether the ordinance affects interstate commerce, for if there is no effect, there can be no burden and that ends the inquiry. If there is an effect, we must then ask 2) whether the legislature has acted within its province, and 3) are the means chosen adapted to the end.

The question whether benefit will result from the elimination of nuisance algae, he ruled (A. 9), is a policy question for the legislature. The courts should not attempt to evaluate the legislative decision as to the policy question.

On the other hand, whether the means chosen by the ordinance are adapted to its end is a proper subject for judicial inquiry. However, Judge Swygert ruled (A. 9, 10), in making such an evaluation, if the end is legitimate and the burden on interstate commerce is slight, the presumption of validity attaching to legislation dictates that the means chosen be presumed to be reasonably related to the end, unless the contrary is proven by clear and convincing evidence.

Petitioners (pp. 14, 15) attack this presumption as an unjustifiable creation of the court of appeals. But certainly the well established presumption of validity attaching to duly enacted legislation dictates a rebuttable presumption that the legislature exercised its discretion reasonably in determining what means are suitable to encompassing the end sought.

No support for petitioners' position is to be found in this Court's recent decision in *Allenberg Cotton Co., Inc.* v. *Pittman*, ..... U.S. ....., 42 L.ed. 2d 195, 43 L.W. 4001 (1974), cited in the petition for certiorari (p. 12) and in the amicus brief of the Chemical Specialities Manufacturers Association (p. 6). That suit was brought in the Mississippi courts by a Tennessee cotton merchant against a Mississippi farmer, who refused to make delivery under a futures contract between them. The Mississippi Supreme Court held that the Tennessee plaintiff could not use the Mississippi courts to enforce the contract because it had not obtained a certificate to do business in Mississippi. This Court, in reversing, relied on the fact that the plaintiff had no office or warehouse in Mississippi and, finding that plaintiff's contacts with Mississippi lacked "localization," held that Mississippi's "refusal to honor and enforce contracts made for interstate or foreign commerce is repugnant to the Commerce Clause."

In contrast to the Allenberg Cotton Company, petitioner Procter and Gamble is distinctly "localized" in Illinois and in Chicago, where it operates a big modern plant requiring the services of many employees. Nor did the State police power, or that of its political subdivisions, enter in any way into the *Allenberg Cotton* case, as it does here.

*National Bellas Hess, Inc.* v. *Department of Revenue of the State of Illinois,* 386 U.S. 753 (1967), cited several times in the amicus curiae brief of the Soap and Detergent Association (pp. 9, 10, 11), also turned on the plaintiff's lack of "localization" in the state attempting to impose a use tax on it.

## V.

**THE COURT OF APPEALS DID NOT ERR IN HOLDING THE BURDEN OF INTERSTATE COMMERCE, THAT RESULTS FROM THE ORDINANCE, IS SLIGHT.**

**IN FACT, PETITIONERS DID NOT PROVE THEY WERE DAMAGED.**

According to the testimony of Procter and Gamble's general sales manager, William E. Forbes, Procter and Gamble prior to the effective date of the ordinance, "shipped about 96% of the requirements of the Chicago plant area from the Chicago plant, manufactured there" (A. 438). When the 8.7% limitation became effective in 1971, the company, he said, had to involve its plants in Kansas City, St. Louis, Dallas and Quincy, Illinois, to supply the Chicago plant area (A. 439, 445).

Commencing July 1, 1972, when the complete ban went into effect, Procter and Gamble withdrew its leading product, Tide, from the Chicago market and did not offer it with no-phosphate ingredients until November, 1972. In the interim, there was some increase in the sale of some

of the company's other brands with no-phosphate contents, but that increase, he said, was only a small fraction of the volume of the former phosphate product, Tide.

At the time of the trial, the company was shipping no-phosphate products to Chicago from its plants in Cincinnati, St. Louis, Kansas City and Alexandria, Louisiana. The so-called Chicago plant area of Procter and Gamble comprises northern Illinois, Wisconsin, Minnesota, part of Iowa, northern Indiana and western Michigan. In 1970 its sales in that area amounted to $58 million (A. 441, 442). (The Chicago plant area of Procter and Gamble is not to be confused with the Chicago wholesale grocery warehouse marketing area, which comprises northern Illinois, southern Wisconsin, southwestern Michigan and northern Indiana (A. 603, 615).)

On cross-examination, Forbes admitted (A. 560) that Procter and Gamble is constantly making such logistical changes by executive decision in order to adjust to day to day production and marketing emergencies and that these continual changes are a complex web. He also admitted that the existence of anti-phosphate detergent legislation in other states, particularly in Indiana and Michigan, would have compelled the company to make such adjustments even if the Chicago ordinance had not existed.

The warehousing situation in the Chicago area was testified to by Joseph O'Dea, Procter and Gamble's supervisor of sales in the Chicago area, in which there are 17 major warehouses. These are owned and operated by the principal chains and cooperatives. The number of stores served by each warehouse varies from 200 to 900 (A. 615). The 17 warehouses service about 2600 stores in the City of Chicago (A. 609, 658). Petitioners' map of the Chicago marketing area is reproduced at A. 183.

O'Dea contended that these warehouses, which customarily each carry 3500 to 4000 items (A. 608), each of these items being given an item number, do not have the capacity to "dual slot" both no-phosphate and phosphate formulation of the same brand of detergent. He asserted (A. 653) that if he asked a warehouseman to carry both phosphate and no-phosphate Tide, "he would throw me out."

A slot, O'Dea explained on cross-examination (A. 624, 625), is a particular area in a warehouse where a particular brand or brand size is located. The warehouses do not have shelves. A slot is a floor area on which a pallet or shallow platform rests. Items are stacked on those pallets. Each size of Tide occupies a different slot. But O'Dea did not explain why such a flexible arrangement could not readily be adjusted to accommodate two formulations of each brand by simply increasing the numbers on the pallets and reducing the size of the renumbered areas.

O'Dea reported that, as a result of the ordinance and the policy of the warehouses, none of the 17 Chicago area warehouses carried unlimited phosphate Tide, 15 carried only no-phosphate Tide and two, whose business was mostly suburban, carried only 8.7 percent Tide.

He estimated (A. 618) that the changes occasioned by the ordinance—and by the company's four month voluntary withholding of Tide from the Chicago market area—resulted in a loss of business for petitioner Procter and Gamble in the amount of $4,700,000 (A. 618, 691-5, 728).

But the plaintiffs objected to any inquiry into offsetting economies, such as the use of more productive plants, savings in labor costs, etc. No documentation was offered to substantiate the mere assertions. The district court sustained plaintiffs' objections and thus foreclosed any pos-

sibility of proving Procter and Gamble suffered actual damage.

Procter and Gamble's abstention from offering any heavy-duty laundry detergents in the Chicago market area for four months in 1970 was admittedly its own voluntary business decision. Its principal competitors, Lever Brothers and Colgate-Palmolive, did not make the same decision. They complied with the ordinance and sold no-phosphate heavy duty laundry detergents in Chicago and the Chicago warehouse area. Lever Brothers and Colgate-Palmolive did not become parties plaintiff in this lawsuit.

The witness for petitioner FMC, which manufactures and sells chemicals used by the detergent industry, was Frederick A. Gilbert, its vice-president in charge of administration for its chemical group (A. 806-814, 845-858). But he admitted FMC also manufactured substitutes for phosphates in detergents and that although the delivered price of phosphate is a little more than 8 cents a pound, whereas the substitute soda ash is 2 cents a pound, the margin of profit on the substitutes was greater than on the phosphates. FMC's counsel objected to any inquiry into actual profit and loss. The district court sustained the objection. In consequence, petitioner FMC Corporation also failed to prove damage.

In its Decision and Order, the district court dismissed the three other plaintiffs in this lawsuit—the Soap and Detergent Association, Monsanto Company and Amway Corporation—for failure to prove the jurisdictional amount of $10,000 required by 28 U.S.C. §1331. These dismissals have not been appealed.

Yet, the remaining plaintiffs, Procter and Gamble Company and FMC Corporation, no more *proved* the jurisdictional amount than did the plaintiffs dismissed.

## VI.

### THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE BURDEN ON INTERSTATE COMMERCE RESULTING FROM THE ORDINANCE IS SLIGHT.

In the section of its opinion (A. 10-A. 15) dealing with what, if any, burden is imposed on interstate commerce by the ordinance, the court of appeals considered four arguments of the petitioners.

They had argued that the ordinance impaired the normal operations of companies having interstate sales, in that the particular system of distribution used before the ordinance could no longer be used. The court noted (A. 10, 11) that this had not happened because the ordinance required it, but because the companies' operations were, pursuant to their own business choices, set up as they were. Indeed, if petitioners' facilities had all been located within the state of Illinois, they might still have had to make similar adjustments within the state, yet that would not have constituted a burden on intrastate commerce. Furthermore, as Procter and Gamble's general sales manager admitted, the company is continually making such logistical changes. The inconvenience was probably only temporary anyway. Sooner rather than later, the company would probably have adjusted its production and distribution to the most practical pattern. The court of appeals correctly found that "[w]hile this factor might necessitate a change in certain production facilities, it does not rise to the level of an unconstitutional burden on interstate commerce." (A. 11).

This result is in accord with the conclusion reached in *Colgate-Palmolive Co.* v. *Erie County,* 327 NYS 2d 488, at 491 (Sup. Ct. 1971), a similar case involving an attack

on the validity of another enactment regulating phosphorus in detergents, in which the court ruled:

> "The primary burden which is placed upon the petitioner Colgate involves nothing more than the changing of production facilities at the point of origin. There is no interference mandated by the County Law with transit across the state lines . . ."

This result is also in accord with the decision of the three judge district court that denied an injunction against enforcement of the Indiana ban on phosphorus in detergents in *Soap and Detergent Association* v. *Offutt*, 3 ERC 1117, at 1119 (SD, Ind., 1971), in which the court said:

> "[W]e think it certainly is true where you have a carrier who necessarily goes from state to state carrying the goods of third parties there is a higher interest in uniformity throughout the nation, but with respect to a commercial enterprise such as a manufacturer of detergents there is not the same national interest in uniformity throughout the country."

The argument of potential for conflicting legislation was rejected by the court, since no actual conflict had been proven.

It is to be noted that petitioners' complaints about "balkanization" of the detergent industry are exaggerated to the point of being fictitious. The enactments regulating phosphorus in detergents are not confusingly variegated. They call either for a total ban or an 8.7 percent limitation. The detergent industry has been living with such regulations for several years now.

The argument that the ordinance constituted "an embargo on a safe, useful and unique product" was rejected by the court (A. 12) on the ground there was no discrimination against outside manufacturers in favor of local manufac-

turers, who were also subject to the ordinance. It might have also been noted by the court that the self-serving decription of phosphate detergents as "safe" assumes as true what petitioners must prove—that is, that such detergents are not deleterious to the environment. At the City Council hearing, petitioner Procter and Gamble admitted that phosphate detergents are not environmentally harmless.

As to the argument based on the alleged extraterritorial effect of the ordinance in communities other than Chicago, the court concluded (A. 13-15) there was a burden, but it was slight. It expressed scepticism about the "double slot" testimony, and voiced the suspicion that Procter and Gamble might be more persuasive with the warehousemen if no lawsuit was pending. The court did consider the alleged fact that customers outside Chicago cannot obtain phosphate detergents where they are legal, a disruption and a burden. But the court found this only a slight burden, because there are other channels available for obtaining such detergents and some Chicago warehousemen were in fact stocking 8.7 percent phosphate detergents for the suburban trade while the ordinance was in effect.

These careful determinations by the court of appeals are sound and in accord with the evidence in the record. They do not require review by this Court, particularly in view of the further fact that, even though Procter and Gamble claims a largely self-inflicted loss of $4,700,000.00, that is greatly overbalanced by the saving to the taxpayers of Chicago of $20,000,000.00 a year because of reduced sewage treatment cost.

## VII.

**THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE GOAL OF THE ORDINANCE AND THE MEANS SET BY IT FOR OBTAINING THAT END ARE CONSTITUTIONAL.**

The court of appeals recognized (A. 15, 16) that the Chicago ordinance is part of an overall, national attack on water pollution. The Federal Water Pollution Control Act (33 USC §1370 (Supp. II, 1973)) not only permits, but encourages such local legislation. The aim of the ordinance is to eliminate nuisance algae and that is a proper objective for the City of Chicago, which has a right to be concerned about preventing damage from its effluent to its neighbors downstream on the Illinois River.

As to the aptness of the means chosen to achieve that end, the court ruled that it should accept the determination of the City Council to that effect unless it is disproven by clear and convincing evidence.

As to the condition of the Illinois Waterway with respect to nuisance algae, the court found that the evidence is conflicting (A. 17). The City produced photographs showing such growths, but there was testimony there were none. The court of appeals accepted it as a fact that there are some nuisance algae in the Illinois River and that there can be more. Even if phosphorus is not now the limiting factor there, the ordinance within a few months drastically reduced the phosphorus in the sewage effluent from Chicago going into the Illinois River. The Chicago ordinance is "a significant first step" toward the goal of reducing phosphorus in the waterway until it is a limiting factor and its absence then eliminates and prevents nuisance algae in the Illinois Waterway.

"There is no question," the court found (A. 19), "that both eutrophication and phosphorus are serious problems concerning Lake Michigan." Though the flow of sewage from Chicago into the lake during heavy rainfalls is minimal, "the phosphorus level is at such a precarious point that even this minimal amount takes on added importance." The court found that "Chicago has a legitimate interest in banning phosphate detergents as an example for other communities presently releasing their sewage into Lake Michigan" (A. 19).

"Based on all the evidence," the court of appeals concluded (A. 20), "the presumption afforded the City Council's judgment has not been overcome."

That just result should not be set aside.

## VIII.

**THE OPINION OF THE COURT OF APPEALS DOES NOT LIMIT THE PROTECTION OF THE COMMERCE CLAUSE TO METHODS OF INTERSTATE TRANSPORTATION, SUCH AS TRAINS AND TRUCKS.**

**THE DECISION BELOW DOES NOT THREATEN TO DESTROY THE NATIONAL MARKET.**

The petitioners accuse the court of appeals of unjustifiably limiting the protection of the commerce clause "only to methods of interstate transportation" (Petition, pp. 10, 11).

What the court of appeals actually did was to note the discrepancy between the complaint of the petitioners and the precedents they relied on to buttress it. The gist of petitioner Procter and Gamble's claimed grievance is that, in order to meet the requirement of Chicago's ban on phosphates in detergents, it had to transport no-phosphate detergents from some of its other plants located in other states,

instead of supplying the Chicago wholesale marketing area from its Chicago plant, as it had done before. To support its contention that this was an unconstitutional burden on interstate commerce it cited cases involving attempted state regulation of interstate carriers, such as *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945) (state statute regulating train lengths), and *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (state statute regulating the size of mudguards on trucks).

The court of appeals pointed out (Petition, pp. A-10, 11) that the ordinance did not interfere with interstate commerce itself, but merely inconvenienced a manufacturer that had factories and distribution centers in numerous states.

The claim of petitioner FMC is merely that the ordinance reduced the demand for its phosphate products, resulting in a loss of sales. FMC failed to establish that it had a constitutional right to a guaranteed sale of its phosphates.

Since the logistical arrangements Procter and Gamble made in order to comply with the ordinance all occurred within the company's internal set-up, even though spread over several states, the court of appeals concluded that "the ordinance is not a burden on interstate commerce, but is merely a 'burden' on a company which happens to have interstate distribution facilities." (Petition, pp. A 10, 11).

Petitioners are knocking down an open door in asserting (Petition, p. 13) that the commerce clause applies not only to trains and trucks, but to cantaloupes, books, correspondence courses, oleomargarine, etc., etc., as well. Of course it does. But a state or local law is not a burden on interstate commerce unless it burdens interstate commerce. Compliance with regulations of intrastate commerce is often inconvenient also.

To burden is to place at a disadvantage. What the Founding Fathers intended by the commerce clause was to assure a national market. To effectuate this, they sought to and did prevent the creation of embargoes, the imposition of customs duties on interstate commerce, and discrimination against out-of-state enterprise. Hamilton's words in *The Federalist*, No. 11, cited by petitioners (p. 11), were made in a plea to the young nation not to place its reliance on foreign ship bottoms, but to create a strong navy and merchant marine of its own. It was not the intention of Hamilton to place interstate commerce in a privileged position by freeing it from health, safety and welfare regulations, including environmental regulations, to which intrastate commerce is also subject.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM R. QUINLAN
Acting Corporation Counsel
of the City of Chicago
511 City Hall, Chicago, Illinois 60602
*Counsel for Respondent*

DANIEL PASCALE
EDMUND HATFIELD
Assistant Corporation Counsel
*Of Counsel*

April 28, 1975

# REPLY BRIEF OF PETITIONER

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MAY 7 1975
MICHAEL RODAK, JR.

No. 74-1109

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

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THE PROCTER AND GAMBLE COMPANY and FMC CORPORATION, *Petitioners,*

*v.*

THE CITY OF CHICAGO, *Respondent.*

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## REPLY BRIEF FOR PETITIONERS

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*Of Counsel:*

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C. 20006

CHADWELL, KAYSER, RUGGLES,
McGEE & HASTINGS
135 South LaSalle Street
Chicago, Illinois 60603

DANIEL M. GRIBBON
CHARLES LISTER
888 Sixteenth Street, N.W.
Washington, D. C. 20006

JAMES E. HASTINGS
JOHN C. BERGHOFF, JR.
135 South LaSalle Street
Chicago, Illinois 60603

*Attorneys for Petitioners*

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No. 74-1109

THE PROCTER AND GAMBLE COMPANY and FMC CORPORATION, *Petitioners,*

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THE CITY OF CHICAGO, *Respondent.*

## REPLY BRIEF FOR PETITIONERS

Petitioners, The Procter and Gamble Company and FMC Corporation, hereby reply to the brief for the City of Chicago in opposition to the petition for a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit.

1. Respondent has misstated the issues presented by this case. Contrary to respondent's claim, petitioners do not urge federal preemption of state and local efforts to respond to environmental problems.[1]

[1] Respondent's reliance upon the Federal Water Pollution Prevention and Control Act, 33 U.S.C. § 1370, is misplaced. Although the Act does not preempt state and local legislation, neither does it exempt such legislation from the restrictions imposed by the Commerce Clause.

Concededly, state and local authorities may adopt legislation reasonably designed to respond to local problems, even if such legislation may tangentially affect the flow of interstate commerce. It is equally well-settled, however, that the Commerce Clause imposes important restraints upon the exercise of local police powers. In particular, this Court has unequivocally declared that local authorities may not regulate interstate commerce "so as substantially to affect its flow or deprive it of needed uniformity in its regulation. ..." *Southern Pacific* v. *Arizona*, 325 U.S. 761, 775 (1945). *See also Pike* v. *Bruce Church*, 397 U.S. 137 (1970). The question presented in this case is by what standards these competing principles should be reconciled so as to accommodate national and local interests.[2]

The opinion of the Court of Appeals in this case provides clear evidence that clarification of the appropriate constitutional standards is urgently needed. The court's opinion reflects confusion and uncertainty regarding the proper application of the Commerce Clause to state and local legislation. The court acknowledged that it had serious doubts as to the "precise test" that should be applied here. (Petition at A-6.) It stated that this case involves "a very difficult constitutional problem." (*Id.* at A-20.) In the absence of what it considered to be adequate guidance from this Court, the Court of Appeals was compelled to strike a "compromise" among the decisions of this Court. (*Id.* at A-9.)

[2] The problem here was wryly described by Thomas Reed Powell almost 20 years ago. He observed that the states may regulate interstate commerce, "but not too much." He added that "[h]ow much is too much is beyond the scope of this statement." T. R. Powell, *Vagaries and Varieties in Constitutional Interpretation* ix (1956). The question of "how much is too much" is, however, directly presented by this case.

Unfortunately, in groping for an appropriate compromise, the Court of Appeals disregarded well-settled principles regarding the proper interpretation of the Commerce Clause. The compromise includes novel requirements that will encourage the imposition of disparate and conflicting local restrictions upon the movement in interstate commerce of safe and beneficial products.[3] Review by this Court is required to clarify the constitutional principles that are applicable here, and to reestablish the strong protection that the Commerce Clause was intended to provide.

2. Contrary to respondent's claim, the Court of Appeals unjustifiably restricted the degree of protection afforded by the Commerce Clause to the free movement of manufactured goods. The Court of Appeals assumed that the full protection of the Clause extended only to the instrumentalities of commerce, and not to commerce itself. (Petition at A-11, 12.) Nothing in the decisions of this Court warrants the imposition of such a limitation. As shown in the petition, this Court has heretofore consistently applied the Clause to protect a wide variety of manufactured and agricultural products from state and local legislation. (*Id.* at 12-14.) Moreover, when the Court has considered state regulation of interstate transportation facilities, it has never suggested that such facilities enjoy a privileged or unique position under the Clause. The novel restriction announced by the Court of Appeals would balkanize the free national market for manufactured goods, and

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[3] As shown in the petition (at 8 n.4, 18 n.14), such conflicting requirements have already been created with respect to the distribution and sale of phosphate detergent products. In these circumstances, respondent's reliance upon Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960), is misplaced.

defeat the strong national policies embodied in the Commerce Clause.

3. Respondent wrongly claims that the result reached by the Court of Appeals may be justified by considerations of public health and safety. The factual findings made by the trial court demonstrate that no such considerations are involved here. (Petition at B-6, 9.) Moreover, even if it were thought that this case involved issues of health and safety, such considerations cannot exempt local legislation from the requirements of the Commerce Clause. Although the Court gave weight to health and safety matters in *Brotherhood of Locomotive F. & E.* v. *Chicago, R. I. & P.R. Co.*, 393 U.S. 129 (1968), it emphasized that the evidence there was "conflicting" and "inconclusive," *id.* at 136, and held merely that in such a situation it was inappropriate to disturb state legislation. *Id.* at 140. In addition, the Court held in *Southern Pacific Co.* v. *Arizona, supra,* that asserted considerations of safety did not justify a substantial interference with the free movement of interstate commerce. *See also Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).[4]

Even where matters of health and safety are assertedly involved, application of the Commerce Clause requires the resolution of questions "of degree," concerning the extent of any burden on commerce, whether less burdensome methods are available to vindicate the local interest, and other similar matters. *Pike* v. *Bruce*

[4] Respondent suggests that in South Carolina Highway Dept. v. Branwell Bros., 303 U.S. 177 (1938), the Court "disallowed" the trial court's inquiry into the factual bases of local legislation. Insofar as *Branwell* may have been intended to create any such rule, it has now been overruled by *Bibb, Southern Pacific* and even *Brotherhood,* where such factual inquiries were conducted by the trial court and considered by this Court.

*Church, supra* at 142. In this instance, however, the Court of Appeals refused to apply the "predominant test" for the application of the Commerce Clause. (Petition at A-7.) It failed to examine questions "of degree," disregarded the findings of the trial court, and instead relied upon a novel presumption of its own creation.

4. Much of respondent's memorandum in opposition consists of a reiteration of factual allegations previously made to the trial court. There is no need to respond in detail to those allegations. They need not be resolved by this Court. They were fully considered by the trial court and, in light of the elaborate evidence presented by petitioners, were either rejected or found not to support the ordinance. The facts relevant to this case are carefully set forth in the opinion of the trial court. Respondent's efforts to circumvent those findings provide no justification for denial of review of the important constitutional issues involved here.

## CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DANIEL M. GRIBBON
CHARLES LISTER
888 Sixteenth Street, N.W.
Washington, D. C. 20006

JAMES E. HASTINGS
JOHN C. BERGHOFF, JR.
135 South LaSalle Street
Chicago, Illinois 60603

*Attorneys for Petitioners*

*Of Counsel:*

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C. 20006

CHADWELL, KAYSER, RUGGLES,
McGEE & HASTINGS
135 South LaSalle Street
Chicago, Illinois 60603

# CERTIORARI DENIED